TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 519

ELEAZAR SMITH, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

FILED NOVEMBER 14, 1958

PROBABLE JURISDICTION NOTED JANUARY 19, 1959

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[fol. 3]

IN THE MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT COUNTY OF LOS ANGELES STATE OF CALIFORNIA

No. 57898

Cr. A 3792

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELEAZAR SMITH, Defendant.

AMENDED NOTICE OF INTENTION TO APPEAL—
Filed November 22, 1957

To The Clerk Of The Above Entitled Court:

You Will Please Take Notice that defendant, Eleazar Smith, hereby appeals to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, from the judgment made on November 20, 1957 after a verdict of guilty was entered.

Dated this 21st day of November, 1957.

Brock, Fleishman & Rykoff, By /s/ Stanley Fleishman, Attorneys for Defendant.

[fol. 21]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

57898

Cr. A 3792

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

WILLIAM A. ROTHWEILER, ELEAZAR SMITH, JOEL WARNER and LAURO J. NERI, Defendants.

EXCERPTS FROM AMENDED COMPLAINT—
Filed January 16, 1957

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says:

* * * * * * *

[fol. 24]

COUNT VII

For a further, separate and seventh cause of action, being a different offense connected in its commission with the offense set forth in Counts I, II, III, IV, V, & VI hereof affiant complains and says: That on or about November 19, 1956, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to wit: Violation of Section 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000) was committed by William A. Rothweiler, Eleazae (sic) Smith, Joel Warner and Lauro J. Neri, (whose true names to affiant are unknown), who at the time and place last aforesaid, did wilfully and unlawfully, at 518 South Main Street, in the City of Los Angeles, have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit: Sweeter Than Life, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale.

* * * * * * *

[fol. 29] All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said defendants and that he may be dealt with according to law.

Subscribed and sworn to before me on January 16, 1957.

/s/ Merritt E. Tayler

(MC 41.01 & 41.01.1)

George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, in said County and State.

By s Melvin Chun, Deputy Clerk.

[fol. 38]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES
APPELLATE DEPARTMENT

Cr. A 3792

Municipal Court Nos. 57898, 57901

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELEAZAR SMITH and WILLIAM J. STEINBERG, Defendants.

EXCERPTS FROM DEFENDANTS' STATEMENT ON APPEAL

Come now the appellants, Eleazar Smith and William J. Steinberg, defendants in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, Nos. 57898 and 57901, and set forth their statement on appeal as follows:

By amended complaint, No. 57898, Eleazar Smith was charged with violating Los Angeles City Ordinance No. 77,000 in a seventeen count complaint. He was charged jointly with William A. Rothweiler, Joel Warner and Lauro

J. Neri. Prior to trial the cases against Warner and Neri were disposed of. After trial, the charge against Rothweiler was dismissed.

By complaint No. 57901, William J. Steinberg was charged with violating Los Angeles City Ordinance No. 77,000 in a fifteen count complaint. He was charged jointly with Isadore I. Glass, Joel Warner, J. Katzev, Sophia Katzev, Herbert Katzev, Lauro J. Neri, Arthur J. Kates [fol. 39] and Helen Katzev Perl. Prior to trial the cases against Joel Warner, J. Katzev, Sophia Katzev, Herbert Katzev, Lauro J. Neri, Arthur J. Kates and Helen Katzev Perl were disposed of. After trial the charge against Glass was dismissed.

The two cases (Nos. 57898 and 57901) were consolidated for trial. In each case a written demurrer was filed and overruled. Each defendant pleaded not guilty and waived jury trial. The case was heard in Division 41 of the Municipal Court of the Los Angeles Judicial District, the Honorable James H. Pope, judge presiding, the defendants being represented by Brock, Fleishman & Rykoff by Stanley Fleishman, and the People being represented by William E. Doran, Deputy City Attorney.

People's Case Against Smith

The People proved that Rothweiler, a clerk in Smith's book store at 518 South Main Street, Los Angeles, California, sold to a police officer, *inter alia*, a hard covered book entitled "Sweeter Than Life". The book was introduced in evidence.

* * * * * * *

Defendants' Case

* * * * * * *

[fol. 40] Defendant Smith testified that he had engaged in the book business for many years; that he had in his store at the time of the arrest well over 1,000 different books and magazines; that he did not know or have reason to believe that the book "Sweeter Than Life" was obscene; that he worked long hours and had no time to read the books and magazines he stocked; that he did not feel qualified to pass upon whether a particular book or magazine

"has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires"; that he purchased his books and magazines from established dealers.

Defendants' Expert Witnesses

In the case of *People* v. *Laura J. Neri*, which was severed by court order but bears the same numbers as here (Nos. 57898 and 57901), defendant called Robert Kirsch, a book review critic for the Los Angeles Times, and Dr. Zoltan Gross, a clinical psychologist, to testify as expert witnesses. After preliminary questions were asked of each of the two witnesses objections were made to any testimony by these experts. Said objections were sustained by the Court and an offer of proof was made. In the instant case the Court ruled that there was no room for expert testimony, and it was stipulated by and between the parties in the instant proceeding that the testimony of the expert witnesses in the *Neri* case and the offers of proof made in connection [fol. 41] therewith might be and the same were incorporated by reference as if the said witnesses were called and testified as they had in the same case of *People* v. *Neri*.

Judgment of the Court

The Court found defendant Smith guilty of Count VII of the complaint only. Each of the other counts was either dismissed before trial or defendant was found not guilty. Count VII of the complaint charged that defendant on or about November 19, 1956 violated 41.01.1 of the Los Angeles Municipal Code in that he did wilfully and unlawfully at 518 South Main Street, Los Angeles, California have in his possession an indecent writing, book, pamphlet, picture, photograph and drawing, to wit: "Sweeter Than Life", in a place of business where magazines, books, pamphlets, pictures, photographs and drawings were sold and kept for sale.

[fol. 42]

Motion and Arrest of Judgment

Before sentence was imposed defendants made a motion in arrest of judgment on the ground that § 41.01 and

41.01.1 of the Los Angeles Municipal Code on their face and as construed and applied were unconstitutional. Said motion was denied.

Sentence

The defendants requested the Court to file an application for probation and said request was denied, and the defendant Smith was sentenced to thirty days in the County Jail, and defendant Steinberg was sentenced to twenty days in the County Jail.

Grounds of Appeal

1. §§ 41.01 and 41.01.1 of the Los Angeles Municipal Code (Ordinance No. 77,000) on their face and as construed and applied are unconstitutional and void because they exceed the bounds of power of the municipality and deprive defendants, and each of them, of their liberty and property without due process of law, contrary to Article I, §§ 1, 9 and 13, and Article X, 11 of the California Constitution, and the due process and equal provisions of the Fourteenth Amendment to the United States Constitution.

2. The said sections of the Ordinance are invalid because they purport to enter a field completely and exclusively covered by the General Laws of the State—Penal Code §311.

3. If the Ordinance is interpreted as omitting the requirement of knowledge of the character of the book or magazine possessed or sold it is unreasonable, arbitrary and violative of the First and Fourteenth Amendments to the United States Constitution, and Article I, §§ 1, 9 and 13 of the California Constitution.

4. §§ 41.01 and 41.01.1 of the Los Angeles Municipal Code (Ordinance 77,000) upon their face and as construed [fol. 43] and applied herein violates freedom of speech and press contrary to Article I, §§ 1, 9 and 13 of the California Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution, and the First Amendment to the United States Constitution.

5. The evidence was insufficient to sustain the verdict against defendant Smith:

(a) As a matter of law and fact the book "Sweeter Than Life" is not obscene.

(b) The book "Sweeter Than Life" is protected by the guarantees of freedom of speech and freedom of press guaranteed by the State and Federal Constitutions.

(c) The People failed to prove that "Sweeter Than Life" "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires".

(d) The People failed to prove who were "the readers" of "Sweeter Than Life".

(e) The People failed to prove that to the average person applying contemporary community standards the dominant theme of "Sweeter Than Life" taken as a whole appeals to prurient interest.

(f) The People failed to prove that defendant Smith had knowledge of the character of "Sweeter Than Life".

* * * * * * * * *

[fol. 44] 7. The Trial Court committed error of law in that it applied the old constitutional rule of *Regina* v. *Hicklin* (1868) L.R. 3 Q.B. 360. Specifically, the Trial Court measured obscenity by its impact upon those into whose hands the material might fall instead of measuring its impact upon the normal adult.

8. The Court erred in excluding expert testimony tendered by defendants.

SETTLEMENT OF TRANSCRIPT

To the Honorable James H. Pope, Judge Presiding, and to William E. Doran, Deputy City Attorney of the City of Los Angeles:

You and Each of You, will please take notice that appellants will file and make part hereof as provided by law and rule of Court, a transcript of the proceedings and evidence reported in said proceedings pertaining to the errors com-

plained of and heretofore alleged in Defendants' Statement on Appeal.

Dated: November 25, 1957.

Brock, Fleishman & Rykoff, By /s/ Stanley Fleishman, Attorneys for Defendants.

[fol. 46]

IN THE MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT

ORDER ALLOWING AND CERTIFYING STATEMENT ON APPEAL AND REPORTER'S TRANSCRIPT—February 11, 1958

The Court does not settle and allow the foregoing Statement on Appeal and Reporter's Transcript and certifies that the same is a true and correct statement of the proceedings had in the above entitled action.

Dated: Feb. 11, 1958.

/s/ James H. Pope, Judge of the Municipal Court.

[fol. 47]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

WILLIAM A. ROTHWEILER, ELEAZAR SMITH, JOEL WARNER, LAURO J. NERI, Defendants.

EXCERPTS FROM DOCKET ENTRIES

* * * * * * *

[fol. 59]

NOV 20 1957 Defendant ELEAZAR SMITH adjudged guilty on Count 7 only, all other counts in this Complaint (57898) against defendant Smith ordered dismissed.

Defendant Smith makes oral application for probation. Motion denied.

Defendant Smith waives time of sentence.

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why judgment should not be pro-

nounced, "It is adjudged and ordered by the Court that, as a punishment for the crime of VIOLATION of 41.01.1 LOS ANGELES MUNICIPAL CODE the defendant shall be imprisoned in the City Jail of the City of Los Angeles for the term of 30 days, and that said defendant shall be discharged from imprisonment upon the expiration of said term."

* * * * * * *

[fol. 62]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 3792
Trial Court No. 57898

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ELEAZAR SMITH, Defendant and Appellant.

OPINION—Filed June 23, 1958

Appeal by defendant from a judgment of the Municipal Court of Los Angeles Judicial District, James H. Pope, Judge. Affirmed.

For Appellant—Brock, Easton, Fleishman & Rykoff.

For Respondent—Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, William E. Doran, Deputy City Attorney.

The defendant Smith appeals from a judgment based upon his conviction under Los Angeles Municipal Code, (Ordinance No. 77,000 as amended) pursuant to the complaint which charged that he violated paragraph 2 of section 41.01.1 thereof, in that he "did wilfully and unlawfully . . . have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit: SWEETER THAN LIFE, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale."

The ordinance provisions in question read in part as follows: "Sec. 41.01.1 Indecent Writings, Etc.—Possession Prohibited:

"It shall be unlawful for any person to have in his pos- [fol. 63] session any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, . . . in any of the following places:

"1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;

"2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

"3. In any toilet or restroom open to the public;

"4. In any pool room or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public: . . ."

Appellant's contentions cannot be sustained:

(1) The ordinance does not violate the First Amendment of the United States Constitution. Under the California Penal Code sec. 311 dealing with obscenity, the United States Supreme Court has held that "obscenity is not within the area of constitutionally protected speech or press." (*Alberts* v. *California*, *Roth* v. *United States* (1957), 354 U.S. 476 at 485, 77 S. Ct. 1304, 1 L.ed. 2d 1498).

(2) The characterization as "obscene" is not too indefinite to constitute a valid standard. In the case last cited, the trial judge applied the test laid down in *People* v. *Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 178 Pac. 2d 853, which was approved by the U.S. Supreme Court in the *Alberts* case (354 U.S. at 489).

(3) Under any test, the book concerned in this prosecution was properly held to be obscene by the trial court, and we share such a conclusion upon our independent view of the evidence, if that be necessary in view of the assertion of constitutional right, though such a right is clearly non-existent. (*Alberts* v. *California* (1957), 354 U.S. 476, 485-486, 1 L.ed. 2d 1498, 77 S.Ct. 1304). Obscenity is not constitutionally protected. The "community stand- [fol. 64] ard" is, as in other criminal matters, to be deter-

mined by the trier of the fact. (*Parmelee* v. *United States* (1940), 113 F. 2d 729, 741).

The police power of the state in such matters is not restrained by the definitions applied by the federal courts to the federal question of admission of books to the country or to the mails. A national common denominator of morality may be considerably less than that in a state, which has the right to set, and to adhere to, its own standards in such matters. (U.S. Const. Amdt. X) That any obscene book or picture may be popular is no ground for holding that it may not be suppressed, since that condition may be exactly the occasion for legislative action against it to protect the public morals. Such legislation preeminently falls within state police power. (*Lawton* v. *Steele* (1893), 152 U.S. 133, 14 S.Ct. 499, 38 L.ed. 385).

We reach this conclusion, also, when we have considered the book as a whole, under tests that the appellant contends are applicable. There are obvious common sense limits to the "over all" view. We are not persuaded that a bawdy house is any the less a brothel, because many of the rooms of the house may be occupied with dining and dancing, in view of what goes on in the bedrooms. A book is not necessarily clean or not obscene because some of the chapters or paragraphs leading to the bedroom, couch, summer house or other available place themselves do not describe the details of adulterous fornication nor rape. (Cf. *Besig* v. *United States* (1953, 208 F.2d 142, 146).

(4) The defendant offered expert witnesses to testify what psychological effect the prurient material in question would have on a normal average person. In California, this is no more the subject of expert testimony than what the conduct of a reasonable and prudent person would be in a negligence action. This is for the trier of the fact. (*People* v. *Wepplo*, *supra*, 78 Cal. App. 2d Supp. 959; cf. [fol. 65] *United States* v. *Kennerley* (1913), 209 F. 119, 121). Nor was it error to exclude evidence as to the contents of other books, alleged to be no different or, even more sexually titillating, on the theory that legislation is invalid which seeks to restrain that which is popular. Pornography has not been popular enough to induce the

state and city legislators who represent the populace at large to change the legislative policies, or to re-define the common understanding of the meanings of well-established English words. The great quarrel in this field actually seems not to be with the definition of "obscenity" but with its application to particular states of fact. We have no such difficulty in this case. We have found that the book in question is obscene, not merely that there is sufficient evidence to support the implied finding of the trial court to that effect, keeping in mind what we said in *People* v. *Wepplo*, *supra* (1947), 78 Cal. App. 2d Supp. 959, 961, in which obscenity was defined in construing Cal. Penal Code sec. 311(3).

(5) The Los Angeles city ordinance No. 77,000 (known as the Los Angeles Municipal Code) section 41.01.1, has the full force of a statute of the state within the limits of the city, (*Odd Fellows' Cemetery Assn.* v. *San Francisco* (1903), 140 Cal. 226, 230, 73 Pac. 987; *Bond* v. *City of Sierra Madre* (1919), 41 Cal. App. 520), except so far as it is "in conflict with general laws." (Cal. Const. Art. XI sec. 11; *Simpson* v. *City of Los Angeles* (1953), 40 Cal. 2d 271, 278, 253 Pac. 2d 464, app. dis. 346 U.S. 802, 74 S.Ct. 37, 98 L.ed. 333, rehearing den. 346 U.S. 880, 74 S.Ct. 118, 98 L.ed. 387).

In California, this police power of cities is one of the oldest municipal powers. Cal. Const. (1879) Art. XI sec. 11, perpetuated the power that was granted in the earliest charters and general laws for organization of municipal corporations in California, repeated and applied many times before 1879. (For instance, Charter of Sacramento, [fol. 66] Cal. Stats. 1850, p. 70 sec. 5; idem, San Diego, p. 122 sec. 5; idem, San Jose, p. 125, sec. 5; idem, for incorporation of towns, p. 128-129, sec. 6; idem, for incorporation of cities, p. 87-88, sec. 11). In the 1879 constitution, article XI related to local government, and the same section number, 11, was retained, as formerly pertained to this power in the Act of Incorporation of Cities. Before the Constitution of 1879, such power was conferred by the legislature. Now, it is conferred by the constitution itself. Prior to 1879, the numerous statutes and special charters gave full power to cities to pass ordinances "not repugnant . . . to the laws of this State." Prior to 1879, the laws

applying to cities were sometimes general and often special, but in 1879 by Art. IV sec. 25, the legislature was forbidden to pass "local or special laws . . . Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts."

Hence, Art. XI sec. 11 vested and vests power in cities to pass police regulations "*not in conflict with general laws*," (emphasis added) Appellant asserts that there is such a conflict here between Penal Code sec. 311 and the ordinance in question.

Under the ordinance, it is illegal for a person to "have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, . . . of any kind in any of the following places: . . . 2. In any place of business where . . . school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale; . . ." (Municipal Code, sec. 41.01.1)

Penal Code sec. 311 provides, so far as applicable: "Every person who wilfully and lewdly, either: . . . 3. Writes, . . . sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; . . . is guilty of a [fol. 67] misdemeanor." Municipal Code sec. 41.01.1 is more restrictive since it eliminates the requirement that a sale be made "lewdly" and in making it illegal to possess such material in such a place of business, irrespective of a lewd intent to sell it or to keep it for sale.

The city ordinance is more restrictive than the Penal Code sec. 311. Under the Penal Code section *scienter* is required. The defendant must possess the obscene material "wilfully and unlawfully" and with "lewd" intent. *(People v. Wepplo, supra* (1947), 78 Cal. App. 2d Supp. 959, 178 Pac. 2d 853; *Matter of Application of Ahart* (1916), 172 Cal. 762, 159 Pac. 160).

There is no conflict. Wilful possession of an obscene book in a bookstore is not made an offense under the Penal Code provision, but it is under the city ordinance. Defendant could not have been prosecuted under Penal Code sec. 311 for wilfully and unlawfully possessing the material in a bookstore without more. This fact alone demonstrates that the municipal ordinance is not in conflict with the

general law. A prosecution may be had under an ordinance and a statute (cf. *People* v. *Burkhart* (1936), 5 Cal. 2d 641, 55 Pac. 2d 846) where separate, distinct elements are involved in each. Local legislation must be *in conflict* with general law, before the constitutional grant of the police power to local bodies is inoperative and that vested in the legislature is given priority. No permission from the legislature itself to a city is necessary to the exercise of the local power under the constitution. Legislative declarations of permission to legislate confer none, but only indicate that the legislature in its own opinion has not purported to completely cover the subject matter. This relates to statutory construction, and not to power.

In this case, the relation of the local to the state legislation is essentially the same as that in *People* v. *Commons* (1944), 64 Cal. App. 2d Supp. 925, where possession of any dangerous or deadly weapon in an automobile was held to [fol. 68] be effective, though the state Dangerous Weapons Control Law was less restrictive; *People* v. *Burkhart*, *supra* (1936), 5 Cal. 2d 641, 55 Pac. 2d 846, where the ordinance prohibited being drunk in an auto on the highway, and the state statute prohibited driving an automobile while intoxicated. *In re Iverson* (1926), 199 Cal. 582, where the state law permitted a druggist to fill a prescription for 16 ounces of intoxicating liquor, reduced by the Los Angeles ordinance to 8 ounces, and in which the doctrine of "more restrictive legislation" is considered and approved; *In re Hoffman* (1909), 155 Cal. 114; 99 Pac. 517, holding valid increased standards for milk solids in milk; *Stovall* v. *Strand* (1946), 76 Cal. App. 2d 432, 434 435, 172 Pac. 2d 921; *Romero* v. *Municipal Court* (1949), 90 Cal. App. 2d 854, 856 858; *Markus* v. *Justice's Court* (1953), 117 Cal. App. 2d 391, 396 397; *Witt* v. *Klimm* (1929), 97 Cal. App. 131, 134, 274 Pac. 1039, upholding additional regulation.

The same conclusion has been reached by the courts of other states which have adopted the provisions or principles of Cal. Const. Art. XI sec 11, cf. *Allen* v. *City of Bellingham* (1917), 95 Wash. 12, 163 Pac. 18, 26, reviewing cases; *City of Shreveport* v. *Provenza* (1956), 231 La. 514, 91 So. 2d 777; *Jones* v. *City of Chicago* (1952), 348 Ill. App. 310, 108 N.E. 2d 802, 805, ordinance raising amounts of

insurance to be carried by taxicab operators above amounts set by state statute, the rule being stated "An ordinance, because of local conditions, may impose more rigorous or definite regulations under a proper delegation of power in addition to those imposed by the State": *State ex rel. Sutton* v. *Caldwell* (1940), 195 La. 507, 197 So. 214, 218, citing *Mann* v. *Scott* (1919), 180 Cal. 550, 182 Pac. 281; and *In re Hoffman* (1909), 155 Cal. 114, 99 Pac. 517, 132 Am. St. R. 75; *City of Garden City* v. *Miller* (1957), 181 Kan. 360, 311 Pac. 2d 306, 311; *State* v. *Catanna* (1956), 265 Ala. 35, 89 So. 2d 570, 571; *Kansas City* v. *Heer* (1915), 96 Kan. 794, 153 Pac. 548, 549, citing *In re Hoffman, supra*, [fol. 69] 155 Cal. 114, 118).

Until one of our supreme courts declares otherwise, we are of the opinion that a book seller may be constitutionally prohibited from possessing or keeping an obscene book in his store and convicted of doing so even though it is not shown he knows its obscene character, nor that he intends its sale. He may not, with impunity, adopt as his rule of conduct: "Where ignorance is bliss, 'Tis folly to be wise."

Those who are engaged in selling articles of a particular class to the public, have the first and best opportunity to know or be on notice of their characteristics, even though possession and not sale is involved. (Civ. Code sec. 18, 19). Statutes commonly have forbidden the sale, offering for sale or possession of filthy articles, dangerous or deleterious to the public; or contrary to public morals; or otherwise unlawful; and have placed the duty to know their characteristics upon the possessor. (Cf. *People* v. *Schwartz* (1937), 28 Cal. App. 2d Supp. 775, 76 Pac. 2d 1017; *Escola* v. *Coca Cola Bottling Co.* (1944), 24 Cal. 2d 453, 463; *United States* v. *Dotterweich* (1943), 320 U.S. 277, 88 L. ed. 49, 64 S. Ct. 134; note 152 A.L.R. 765). The abatement of property used for an unlawful purpose does not depend on the knowledge of the owner. (*People* v. *McCaddon*, (1920), 48 Cal. App. 790, 192 Pac. 325). So with books.

It is a matter of common knowledge that booksellers have possessed obscene books, kept in the back room or the locked case at their places of business. While not displayed for sale, the possession on the premises is validly considered as tending toward exhibition and sale, and hence

possession is validly established as a separate offense, without showing of a le[illegible]d intent, as provided in Penal Code sec. 311. "Possession" frequently is prohibited, without more, in penal statutes. Consult: fish and game, note 125 A.L.R. 1200; unlawful possession of cane gun or bird net, Cal. Fish & Game Code secs. 2008-2009; idem, secs. 8800-8807, [fol. 70] beach nets, salmon, idem, secs. 8212, 8215; narcotics and drugs in prison, Penal Code sec. 4573.6; firearms, Penal Code sec. 4574; counterfeit coin, Penal Code sec. 479; deadly weapons, Stat. 1923, p. 696, sec. 2 as amended; machine guns, Deering's Gen. Laws Act 1971, Stat. 1927, p. 938, as amended).

The judgment is affirmed.

Dated June 23, 1958

/s/ David, Judge.

I concur:

/s/ Bishop, Presiding Judge.

I Dissent.

The legislature by Penal Code sec. 311(3) has occupied the field of selling and keeping for sale an obscene or indecent book. Therefore, under Article XI, sec. 11 of the Const. of California, that portion of sec. 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000) is void which attempts to make it a misdemeanor for a person to have in his possession an obscene and indecent book in a place of business where books etc. are sold or kept for sale. The evidence is undisputed that Smith was the proprietor of a book store in the City of Los Angeles and that he sold and kept for sale the books in question at his store.

The evidence proves a violation of the state law as well as a violation of the ordinance. The problem thus posed is by no means merely academic. A defendant is not guilty of violating Penal Code sec. 311 unless he had knowledge of the character of the material. *People* v. *Wepplo*, *supra* (1947) 78 Cal. App. 2d Supp. 959, 964. To the word "knowledge" we would add "or notice", meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.

To appear profound, we refer to this knowledge or notice [fol. 71] as "scienter". Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does. This is true because the city ordinance uses the words "wilfully and unlawfully", whereas Penal Code sec. 311 uses the words "*wilfully and loudly*". This interpretation and distinction is pointed out in *People* v. *Wepplo*, *supra* (1947), 78 Cal. App. 2d Supp. 959, 963, et seq. The state law has occupied the field of selling and keeping for sale an obscene writing, paper or book. To sell it and keep it for sale, the defendant had the book in his possession at his store. The city cannot deprive him of the defense of "no scienter" by charging him with possession under the ordinance, *People* v. *Commons*, *supra* (1944), 64 Cal. App. 2d Supp. 925; *People* v. *Webb* (1958), 158 A.C.A. 622; the complaint did not state any violation of Penal Code sec. 311 for it failed to charge that the defendant sold or offered for sale the book and magazine *loudly*. *In re Correa* (1918), 36 Cal. App. 512, 513.

It is true as stated in the majority opinion that "there is no declaration by the legislature that it purports to cover the field." Such a declaration is not indispensable. The law as to occupation of the field by the state is well stated in 28 Ops. Atty. Gen. 192 as follows:

"Where the State statute expressly sets forth an intention to completely occupy the whole field of regulation of the subject matter and actually implements such intention by providing for such regulation, local regulation of the same subject matter is prohibited (*Pipoly* v. *Benson*, 20 Cal. 2d 366, 370). On the other hand, the State statute may expressly provide that local regulations may supplement the general law. In such cases reasonable local ordinances imposing supplementary requirements may be enacted (*National Milk Producers Ass'n.* v. *City and County of San Francisco*, 20 Cal. 2d 101, 110-111; *In re Iverson*, 199 Cal. 582, 586-588)."

"If the State statute contains no outright declaration of [fol. 72] intention with respect to local regulation, the determination of the question whether the Legislature has undertaken to occupy exclusively a given field of legisla-

tion depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate' (*Tolman* v. *Underhill*, 39 Cal. 2d 708, 712)."

The question in *Tolman* v. *Underhill*, *supra*, was whether the Regents of the University of California could require from faculty members a more restrictive oath than that required by the State law in Government Code secs. 3100-3109. The court held they could not.

In *Bowen* v. *County of Los Angeles* (1952), 39 Cal. 2d 714, the court held that the state had occupied the same field to the exclusion of an oath required by order of the Board of Supervisors.

It is obvious from a reading of Penal Code sec. 311(3) and the use of "lewdly" therein that the legislature intended to give all proprietors of book stores throughout the State protection of the scienter rule. This is a wise and just provision because these proprietors customarily buy books from advertisements sent out by the publishers. Such dealers order books without an opportunity to read them in advance. I would reverse the judgment.

/s/ Swain, Judge.

[fol. 73]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 3792

Trial Court No. 57898

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

ELEAZAR SMITH, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California.

JUDGMENT—June 23, 1958

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

[fol. 89]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

[Title omitted]

ORDER DENYING REHEARING—June 30, 1958

The petition of appellant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

Dated June 30, 1958

By the Court. Bishop, Presiding Judge, David, Judge.

I would grant the petition. Swain, Judge.

[fol. 90]

Original Volume I

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ELEAZAR SMITH, Defendant and Appellant.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

WILLIAM J. STEINBERG, Defendant and Appellant.

EXCERPTS FROM REPORTER'S TRANSCRIPT ON APPEAL
FROM THE MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT

HON. JAMES H. POPE, Judge

September 23, 1957
September 24, 1957

APPEARANCES:

For Plaintiff and Respondent: William E. Doran, Esq., Deputy City Attorney.

For Defendants and Appellants: Brock, Fleishman & Rykoff, By: Stanley Fleishman, Esq., 1741 Ivar Avenue, Los Angeles 28, California, Hollywood 2-1373, William A. Weigel, Official Reporter.

[fol. 128]

PAUL A. LENZ, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please.
The Witness: Paul A. Lenz. L-e-n-z.
Mr. Fleishman: How do you spell it?
The Witness: L-e-n-z.

Direct examination.

By Mr. Doran:

Q. Mr. Lenz, are you a sergeant of the Los Angeles [fol. 129] Police Department?
A. Yes, sir.
Q. Now directing your attention to the present date of today, to which detail are you attached?
A. Internal Affairs Division.

Q. Would you say that these visits occurred only prior to [fol. 131] the 19th of November of 1956, or would you say any occurred after, to the best of your recollection?

A. I'd say before and after.

Q. You have talked to him apparently in his capacity as owner of this establishment, is that right?

A. I believe so. Yes.

Mr. Doran: I have no further questions, your Honor.

The Court: I don't know as I really know what you mean by "you talked to him as owner of the establishment".

The Witness: That is why I hesitated on the answer to that question. I have been in the establishment on numerous occasions and have had occasion to talk with Mr. Smith, who was most generally seated on a stool behind the counter near the cash register, but the exact conversations I can't recall now. I could only guess that they were related to my work as a police officer and specifically assigned to the Vice Detail. Since he was a book dealer, we occasionally were required to go down there and discuss certain matters with the various proprietors of the bookstores along Main Street.

Mr. Doran: Could I ask one more question? I'm sorry, your Honor.

The Court: Yes.

By Mr. Doran:

Q. Sergeant Lenz, do you recognize the defendant Smith in the courtroom here today?

[fol. 132] A. Yes. That is Mr. Smith, the gentleman seated, the second gentleman over there—excuse me for pointing—from my left in the front row. I believe his first name is Eleazar Smith.

Mr. Doran: Would you stand up, please, Mr. Smith. Just make a motion to indicate it. Thank you, sir.

The Court: Is that the gentleman?

The Witness: That is the gentleman that I know as Mr. Smith, yes, sir.

Mr. Doran: That is all, your Honor.

Cross examination.

By Mr. Fleishman:

Q. Officer, you say you were present when Mr. Rothweiler was arrested, is that correct?

A. Yes, sir.

Q. Were you present at the time Officer Wing, who made the arrest there—was it Officer Wing who was there with you?

A. Correct.

Q. Do you recall whether or not Mr. Rothweiler said anything at the time of the arrest?

A. Yes, he did.

Q. Isn't it a fact that he said at the time he was arrested substantially that he didn't know there was anything wrong with any of the books or magazines that you were arresting him for?

[fol. 133] A. I couldn't recall any specific statement to that effect, no, sir.

Q. Then he said at that time, did he not, that he wouldn't have sold them if he had thought there was anything wrong with them?

A. I'm sorry. I just couldn't say yes or no. He may have.

The Court: Which one is Mr. Rothweiler?

The Witness: I don't believe I see Mr. Rothweiler in the courtroom.

Mr. Rothweiler: I am here.

The Witness: I wouldn't recognize him.

By Mr. Fleishman:

Q. Officer, you made out a police report at the time the arrest was made, did you not?

A. No.

Q. You know that a report was made out?

A. Yes, sir.

Q. Prior to the time you assumed the stand just now, you read that report, did you not?

A. I glanced over it.

Mr. Fleishman: I'll ask if the officer would be shown the police report and see if that refreshes his memory as to the prior question.

The Court: Do you have it there?

Mr. Doran: I have it, your Honor, but, well, I have no objection. Let's put it this way: The officer apparently [fol. 134] hasn't indicated he needs anything to refresh his recollection.

Mr. Fleishman: He said it may or may not have been.

Mr. Doran: I haven't asked him to refresh his recollection. I don't see any purpose in having him refresh his recollection as to the business at hand. When we get to Officer Wing, that will be another instance. I'm afraid he will need it.

Mr. Fleishman: Would you be good enough to.

The Court: Would you, so we can know what we are doing here.

Mr. Doran: Yes, sir.

The Court: He testified he did not make out the arrest report. There seems to be some question about it in counsel's mind. I believe we went one day beyond that period of 20 days on the probation report this morning. Twenty days, if I recall correctly, it just occurred to me during the noon hour. Anyway, all you have to do is to consent to it, and that is all there is to it.

Mr. Fleishman: We'll consent to it.

The Court: All right.

By Mr. Fleishman:

Q. Would you look under that portion of the report that has to do with any statement made by Mr. Rothweiler.

The Court: He said he did not make out the arrest report

[fol. 135] Mr. Fleishman: But he said he was present when the arrest occurred.

The Court: All right.

By Mr. Fleishman:

Q. Have you had a chance to look at that?

A. Yes, sir.

Q. Does that refresh your recollection that Mr. Rothweiler in fact did say that he didn't know there was anything wrong or he wouldn't have sold the books, magazines, if he had any reason to know that they were wrong and obscene?

A. No, sir.

Q. That does not refresh your recollection?

A. No.

Q. One way or the other?

A. No, sir.

Q. He may have said that?

A. He may have.

Mr. Doran: Objected to as calling for speculation and also that it hasn't been established—

The Court: He answered he doesn't know.

Mr. Doran: Thank you.

By Mr. Fleishman:

Q. Now, you say that from time to time, sir, you had gone up and down Main Street once in a while and discussed cer- [fol. 136] tain matters with booksellers there, is that correct?

A. Yes, sir.

Q. Prior to November 19, 1956, can you recall the last time you had been there?

A. No, sir.

Q. As well as you can, can you tell us when it was.

A. (No response.)

Q. Was it a year or more or less?

A. It must have been within the time between when I was assigned to Vice in November of 1955 and the time of the arrest, but as far as pinning it down to any specific date or general period, it would be just merely a guess.

Q. All right. Now, this is just a one-year period actually from the time you were on Central Vice until the arrest, is that correct, from November of '55 to November of '56?

A. Yes, sir.

Q. Can you tell us whether it was on more than one occasion that you were down to this place of business at 518 South Main Street?

A. Oh, yes.

Q. About how many?

A. Specifically inside the place, maybe 10 or 15 times. Passed the place, hundreds of times.

[fol. 137] Q. When you went in the place, you looked to see what kind of magazines and books were out for sale, is that correct?

A. Sometimes.

Q. You say you spoke with Mr. Smith. How many of those times did you actually speak with him?

A. I couldn't recall.

Q. You never asked him whether he was the owner of the store, did you?

A. I couldn't recall that either.

Q. He never said to you that he was the owner of the store, did he?

A. I have a vague recollection of talking to him on one occasion about the bookstore business, but whether or not he told me he was the proprietor or just what was said, I can't remember the specific conversation.

Q. Do you recall, sir, what purchases were made, if any, prior to the time that Mr. Rothweiler was arrested?

A. No, sir. I wasn't present when any purchases were made.

Q. You were at the scene of the arrest but after the purchases were made, is that correct?

A. Yes, sir.

Q. Your conversation on direct examination when you spoke to Mr. Smith as the owner of the store was based on whatever conversations you had with Mr. Smith, is that [fol. 138] a fact?

A. Yes, sir.

Q. You cannot recall any specific instance in which you were told by Mr. Smith that he was the owner?

A. No.

Mr. Fleishman: I have no further questions.

Mr. Doran: Nothing further, your Honor.

May Sergeant Lenz be excused?

The Court: Yes. I don't think he can help us. You may go.

JOSEPH E. WING, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please.
The Witness: Joseph E. Wing. W-i-n-g.

Direct examination.

By Mr. Doran:

Q. Mr. Wing, are you an officer on the Los Angeles Police Department?
A. Yes, I am.
Q. How long have you been on the Department?
A. About three years.
Q. Directing your attention now to the 19th of November [fol. 139] of 1956, on that date to which detail were you attached?
A. Central Vice Detail.
Q. On that date, the 19th of November of 1956, did you have occasion to visit the premises located at 518 South Main Street in the City of Los Angeles?
A. Yes, I did.
Q. Was that about 10:15 or so in the morning, thereabouts?
A. Approximately, yes.
Q. Did you go there alone or in company with other police officers?
A. I went there in the company of other police officers. I entered the establishment alone.
Q. Now, can you describe the premises located at 518 South Main Street.
A. It's a book and magazine store, a book and magazine store.
Q. Is it, shall we say, in a building, or is it located on racks along the sidewalk, or was it at that time, if you recall?
A. Well, some magazines are displayed on racks in the entrance of the establishment, and inside they are displayed on all the shelves, books and magazines both, and I believe

in front is racing information and different stuff like that. [fol. 140] Q. On that date, the 19th of November of 1956, when you entered the establishment, what did you do?

A. I purchased some magazines and a book.

Q. Do you recall at this time what magazines and books you purchased?

A. Yes. I purchased a copy of Adam Magazine and Exotique Magazine and Bust Out Laughing, a comic magazine, and a book, Sweeter Than Life.

Q. Officer Wing, directing your attention to a book bearing the title Sweeter Than Life, is that one of the books that you purchased there on that occasion?

A. Yes, it is.

OFFER IN EVIDENCE

Mr. Doran: I offer it as People's Exhibit 1, your Honor, in this group of cases.

The Clerk: May that be marked People's 15?

Mr. Doran: Are you referring to the other case? Is that why we are starting with 15?

The Clerk: It was first consolidated. Then it was separated and then they were dismissed.

Mr. Doran: It's going to be difficult enough for the lady as it is. Any way she wants it is good for me.

The Clerk: I am not sure, but I think that is right.

The Court: He has not been tried now in the other case, Neri?

The Clerk: No. I just said on the exhibit People versus [fol. 141] Neri. If I started now and had some more People's Exhibits 1, I think it would confuse the rest.

Mr. Doran: I think she is right. It could be in a future date these cases might by someone be considered as a group, and it would be better if we didn't use the same numbers. I agree with that.

The Court: Well, how would you suggest marking them?

Mr. Doran: Whatever she wants. Start at 15.

The Court: 57901 is one of these cases. It was also a number of Mr. Neri's case. This would be People's, if I said it was People's 1, there is also a People's 1 in 17901, but that was only as to Neri. This would be only as to these

particular defendants that would still be in case No. 57901, so I believe this would have to be called People's Exhibit 15, to be sure there is no mixup. It is People's Exhibit 15 in case No. 57901.

Why couldn't you make it People's Exhibit 1 and give the names of the defendants, like G. S. R. and S.? That would be the names of the four defendants, or any way in which you designate it's a separate series than what the others were. It could be A.

The Clerk: Yes, but a better suffix. I anticipate perhaps Mr. Fleishman might have some exhibits of his own that we'll use the letters on.

The Court: Letters preceding a number.

[fol. 142] Mr. Doran: That is all right. Surely.

The Clerk: Or it could be People's Exhibit 1 and then these letters.

The Court: We have had the same problem before, and we just put a letter ahead of it to show it was a different series.

The Clerk: To call it People's A-1.

The Court: Yes.

The Clerk: It could be People's A-1.

The Court: That would all right.

Mr. Doran: Fine, your Honor.

The Clerk: Is this for identification?

The Court: No. It is in evidence. Didn't you offer it in evidence?

Mr. Doran: I offer it in evidence now. Yes, sir.

. . . . . .

[fol. 186] Cross-examination.

By Mr. Fleishman:

Q. It's a fact, is it not, Officer, that Mr. Rothweiler was arrested because he sold to you the following three items: Adam, Exotique, and Sweeter Than Life?

(The question was read by the reporter.)

The Witness: Yes, it was.

[fol. 187] By Mr. Fleishman:

Q. Directing your attention to the item Ladies' Man, which is A 3 for identification, that was picked up, was it not, because it was kept for sale in a place of business?

A. Yes. That is correct.

Q. Your answer would be the same as to Boss Lady, which is A-4?

A. Yes.

Q. Your answer would be the same to Sword of Desire, which is A-5?

A. Yes.

Q. The answer would be the same for Young John, which is A-6?

A. Yes.

Q. Your answer would be the same for Baedeker of a Bachelor, A-7?

A. Yes.

Q. Your answer would be the same for Strange Awakening, A-8?

A. Yes.

Q. Your answer would be the same for Photo Album, which is A-9?

A. Yes.

Q. Your answer would be the same for Exotique, Volume I, No. 1, which is A-10 for identification?

A. Yes, sir.

[fol. 188] Q. Your answer would be the same for Exotique No. 6, A 11 for identification?

A. Yes, sir.

Q. Your answer would be the same for Exotique No. 7, A 12 for identification?

A. Yes, sir.

Q. Your answer would be the same for Exotique No. 8, A 13 for identification, is that correct?

A. Yes, sir.

Q. It's a fact, is it not, Officer, that at the time Mr. Rothweiler was arrested he told you that he didn't know there was anything wrong with any of the books or magazines which you picked up?

A. Yes, sir.

Q. He told you, did he not, that he wouldn't have had anything to do with it if he thought they were obscene or indecent?

A. Yes. He said substantially that. I don't recall his exact words.

Q. But that was his statement in substance?

A. Yes.

Q. He also told you at that time, did he not, that he was merely a clerk in the store, and that he had nothing to do with the purchasing of those various items?

A. Yes. That is right.

Q. Officer, had you ever been into this particular store [fol. 189] prior to November 19, 1956?

A. No.

Q. This is the first time you were there?

A. Yes.

Q. It's a pretty big store, isn't it?

A. It's, say, an average sized bookstore.

Q. What would your best guess be as to the number of books that were in this bookstore?

A. I don't know.

Q. Or the number of magazines?

A. I don't know that either.

Q. It's a fact, of course, Officer, that in the immediate area where this store is located, there are burlesque houses?

Mr. Doran: Objected to as irrelevant and immaterial.

The Court: Yes. I don't see the relevancy of it.

Mr. Fleishman: May I be heard very shortly?

The Court: Yes.

Mr. Fleishman: I do not know if there are subdivisions, if Main Street is its own community, if your Honor please, where, so to speak, people do go and they can see burlesque right next door and dance houses; it may be that this is so. I am not prepared to argue that in force.

[fol. 190] The Court: That what is so?

Mr. Fleishman: That Main Street being a community where there are a lot of burlesque shows, burlesque houses as such, that perhaps there is more room for more magazines than there would be, for example, in, perhaps, Pasadena or some other area. In any event, I think that

the immediate area, perhaps it would not be harmful to have that described somewhat.

The Court: Well, if that is the point, all right. Go ahead. I'd say he'd say yes, there were burlesque houses there.

Mr. Fleishman: I'm sure that he will.

The Witness: Yes.

By Mr. Fleishman:

Q. Officer, there were many magazines and books, of course, at the store that you did not pick up, is that the fact?

A. Yes, sir. That is right.

Q. There were magazines at the store which had in them pictures of nudes, is that correct, that you did not pick up?

A. I don't know. I didn't page through any of the magazines.

Q. Were you looking for just specific things, is that correct?

A. Yes, sir. I was.

Q. When you saw that, you picked it up, and if you saw [fol. 191] anything else, you paid no attention to it, is that the fact?

A. Yes.

Q. Are you familiar generally with the kind of magazines that are on the newsstands?

Mr. Doran: Objected to, your Honor, as irrelevant and immaterial.

The Court: You may answer if you are familiar generally with the character and class of magazines on newsstands.

The Witness: Do you mean all types of magazines or any particular?

By Mr. Fleishman:

Q. Well, let's bring it down. In the general classification, of, however you would classify, say, Adam Magazine.

A. No, I'm not. I'm not familiar with it.

Q. Do you know the magazine Man at all? Have you ever seen that magazine?

A. I have heard of it, but I have never had it.

Q. So far as you know, is Man considered to be obscene by the Los Angeles Police Department?

Mr. Doran: Objected to as irrelevant and immaterial.

The Court: In what way would we learn any fact that is relevant here, whether the Police Department thinks that is wrongful or not?

[fol. 192] Mr. Fleishman: Well, if your Honor please, these magazines which I have on the table are considered by the Police Department to be not obscene, for example, if they knew that they were being circulated generally and if they do not appear to be substantially different or perceptibly different from what we have here, it would seem to me to be some evidence of the fact that the magazines which are charged themselves are not obscene.

The Court: It is not for the Police Department to make the decision, is it? Isn't that now up to the Court, unfortunately? I say "unfortunately" because it's not a pleasant task.

Mr. Fleishman: It is not a pleasant task, your Honor. However, one of our defenses in this case will be, and I know there are some problems around it, but perhaps the major defense will be that the defendant neither knew nor had any way of knowing that these magazines were obscene, and that if it be the fact that these magazines were to all intents and purposes lawful, being circulated and distributed with the knowledge and at least apparent approval of the authorities, that then the defendants would say, "What could we do?" and this is what we will say regardless of the ultimate determination as to whether a magazine is on this side or that side of the law.

The Court: I don't believe that the opinion of the Police [fol. 193] Department is material.

Mr. Fleishman: I quite agree with your Honor that whether they say it is obscene or not obscene doesn't make that the fact. I do believe, though, that if, again, the police do come into the various stores from time to time and they saw these magazines and didn't do anything about them, that storekeepers as such might be able to and should be able to say, "Well, apparently this is all right," and as long as they are within that framework, to believe that they were operating within the law.

The Court: Wouldn't that make the Police Department really the last word as to their buying agent or purchasing agent? That would make them run up to the Police Station every time they had any question in their mind and say, "What about this, officer? May we buy these magazines?"

Mr. Fleishman: If your Honor please, the way the law is now the dealers would prefer, as unfortunate that situation would be, I believe they would prefer that to the position they find themselves now in where there is no place they may go. But that aside, our purpose is to show a twofold purpose, and, as I say, I approach it tentatively, because it is a difficult problem. I do believe, though, if these magazines were distributed for any substantial period of time with the knowledge and apparent approval of the [fol. 194] authorities, that that might—I don't say it would, necessarily—it might be some support for the proposition that these magazines were accepted by the community and, additionally, that the defendants here—and I, of course, know your Honor is well aware of the fact that these gentlemen are not publishers of these magazines—as dealers, that they might very well believe honestly that what they had was in the safe category, and, therefore, could not properly be punished.

The Court: You see, this is not under 311. You don't think that is out?

Mr. Fleishman: No, I don't, your Honor.

The Court: It seems to me it is.

Mr. Fleishman: It may be.

The Court: The objection will be sustained.

[fol. 361] William A. Rothweiler, a defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your name?

The Witness: William A. Rothweiler.

Direct examination.

By Mr. Fleishman:

Q. On November 19, 1956, what was your occupation?

A. A clerk.

Q. A clerk at the store at 518 South Main Street, is that correct?

A. That is correct.

Q. Did you have anything to say as to what magazines or books would be purchased?

[fol. 362] A. No.

Q. Do you have any idea that any of the books or magazines in the store were obscene?

A. No, I don't, because I don't read them. I have not got time. I have got to watch people. I have certain duties to perform, and I haven't got time to read.

Mr. Fleishman: I have no further questions.

The Court: Any questions?

Cross examination.

By Mr. Doran:

Q. These duties that you have to perform, they are selling the merchandise you have there for sale?

A. Well, the first duty I have is to see that no one who is not to, handles any of our magazines, art magazines and art books.

The Court: I don't quite hear that.

The Witness: Anyone who is not 21 years of age, he cannot handle our art magazines or art photos and books. That is one of the duties.

The other one is to see to it that everything is covered up and in its place.

The third one, of course, is to look after the customers and see that they are taken care of and that they don't walk away with the merchandise and not pay for it.

[fol. 363] By Mr. Doran:

Q. What do you mean? Don't you let anybody under 21 in your store?

A. We do, because we have other merchandise, too, other books which, we have many books like Civil Service books which they can buy and we don't watch them. The moment they get close to a magazine or book I'll walk up to them

and I'll ask them, "How old are you?" And they say, "19, 20," or if they say 21 and I am not quite sure, I ask them for identification.

Q. What is it?

A. I can say this, that as long as I have been with Mr. Smith that I have conscientiously taken care of the people that come in there, that no one has ever handled a book or magazine who was not 21 years of age.

Q. How do you happen to make that rule? What caused you to do it?

A. We have a sign up there. Mr. Smith told me about it. He said, "Don't let anyone handle any books or art magazines unless they are 21 years of age." We have a big sign up in the store.

Q. What are these books and magazines you don't want these juveniles to handle?

A. Well, the books which we are discussing, the one book they picked up, like Sweeter Than Life.

Q. You wouldn't want any juveniles handling that book? [fol. 364] A. Well, they are not—I don't know. That is just what I have been told.

Q. Who told you?

A. Mr. Smith told me.

Q. He told you he didn't want any juveniles to have anything to do with Sweeter Than Life?

A. There is another reason for that, too. When people come in, they are only 19 and 18 years old, and they don't buy nothing. They just walk around and look at things and walk out. As I said, the law reads 18 years of age, but Mr. Smith raised it up to 21, just to be sure that there wouldn't be no trouble of any kind.

Q. What do you mean "no trouble"?

A. That is all. You'll have to ask Mr. Smith. That is all I know about it.

Q. What magazines have you been told to keep the people under 21 away from?

A. Any art magazine. For example, like Man, Nugget, Adam, and Escapade, or these little magazines. What is the name of it, now? Exotique. All these magazines, no one under 21 can pick them up.

Q. You don't want any kids around them?

A. Not only kids. A man of 21 years of age. They have to be 21 years of age in order to be able to handle these books.

Q. Mr. Smith told you to make sure that happens?

[fol. 365] A. Yes, sir. I have followed that instruction.

Mr. Doran: Your witness.

Mr. Fleishman: No further questions.

The Court: That is all.

Eleazar Smith, a defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Will you state your name.

The Witness: Eleazar Smith.

Direct examination.

By Mr. Fleishman:

Q. Mr. Smith, for how long a period of time have you been in the book business?

A. Oh, I'd say about eight years.

Q. For how long a period of time have you been at the same place?

A. In this place, not quite two years.

Q. What is your age, by the way?

A. My age is 72.

The Court: A young man.

The Witness: Yes.

By Mr. Fleishman:

Q. Now directing your attention, sir, to the books that are involved in this proceeding, and they are Sweeter Than Life, Ladies' Man, Boss-Lady, Sword of Desire, Young John, Baedeker of a Bachelor, Strange Awakening, have [fol. 366] you read any of those books?

A. No.

Q. Where do you get the books?

A. Mostly we get them from New York.

Q. Do they come to you through the mails?

A. Yes.

Q. Did you ever believe prior to the time you were arrested on November 19, 1956, that those books or any of them were obscene?

A. No, because the officers, they are coming in practically every night and reading those books and buying them. We have got plenty of law officers that come in and buy those books themselves.

Q. These books have been on the stand for a long period of time?

A. They have been on the stand since the book is out.

Q. Take, for example, the book Boss-Lady. For how long a period of time was that on your shelf?

A. Well, I'd say about three or four years.

Q. During that period of time, did the police officers ever look at it, to your knowledge?

A. Yes.

Q. Did you have any reason to believe that there was anything wrong with it?

A. No.

[fol. 367] Q. Now directing your attention to the magazines charged in this Complaint, did you have any reason to believe that the magazines or any of them were obscene?

A. Some of them I didn't even look at them.

Q. Did you have any reason to believe that any of them were obscene?

A. No.

Q. Would you have handled any magazine which you thought was obscene?

A. No.

Q. Or any books that you thought were obscene?

A. No.

Q. To the best of your ability, were you trying to run a lawful business?

A. Right.

Q. When is the last time you read a book, Mr. Smith?

A. The last time, it's a long time.

Q. It would take you quite a while to read a book, wouldn't it?

A. It would take me about three months to read a book.

Q. How many books do you have in your store?

A. Well, I can't judge, but I'll tell you the size of the store. The store is 18 by 60, and books are around beside the shelves. There is all on top around with books. All the [fol. 368] surroundings. I have a picture of it.

Q. You have several thousand books there at least, havn't you?

A. Oh, yes.

Q. You have a great variety of magazines, is that correct?

A. That is correct. The same amount. Like on top and the bottom. You see, I don't deal with Sunset News. I mostly buy back numbers.

Q. You buy second-hand?

A. That is right.

Q. And you purchase?

A. Mostly with the tops cut off.

Q. You purchase them through the mails or how?

A. Well, some of them come through the mail. Most of them come through freight, because the mail is too high-priced.

The Court: Where do you buy your books?

The Witness: They mostly come from the East. New York.

The Court: Used book dealers?

The Witness: Some of them, yes. Most of them are new ones, the books.

The Court: You sell new books?

The Witness: We sell new, too. Old, second, and new, too. There is a company in New York called Remainder, [fol. 369] and they send us circulars. In fact, I have got some circulars here that they are coming in, and we order them. Mostly you have got standing orders in the books. A book comes in. They send us so many. We sell it. We order more.

The Court: These are new books?

The Witness: Yes.

The Court: I mean used books.

The Witness: Also from the East.

The Court: From the East?

The Witness: Yes.

Mr. Fleishman: I have no further questions.

The Court: I have nothing.

Cross examination.

By Mr. Doran:

Q. Do you sell very many of these books like Boss-Lady and Sweeter Than Life?

A. Oh, yes.

Q. Quite a few? How about Exotique? Do you sell very many of them?

A. Exotique, yes.

Q. Enough to keep 3,000 of them on stock?

A. Well, yes. That is another thing. You see, the more I buy, the way I buy, I buy different. They buy from so many. I buy a lot, and I buy them cheaper, so naturally I buy more.

[fol. 370] Q. These Exotiques or these books, are they all new?

A. Exotique, yes, they are new. Exotique, those kind of magazines are new.

Q. But you have never read any of them?

A. No.

Q. You don't know what is in them?

A. I don't.

Q. You haven't read any of these books that you're charged with?

A. No.

Q. How did you happen to tell Mr. Rothweiler not to let anybody under 21 get around?

A. For the simple reason, I am a location that they call a little bit in the rough, Main Street, and, naturally, there are lots of kids coming in, and if you let them linger on, they will linger.

The Court: They'll do what?

The Witness: Kids come in and like to linger around there. So we don't let them. The minute they touch something, we tell them, "Put it down." Naturally, if you can't read nothing, he walks out.

By Mr. Doran:

Q. No matter what they touch, you tell them to get out, is that right?

A. That is right.

Q. So you don't sell very much to 18, 19-year-olds?

[fol. 371] A. The minors, no, we do not have no business with them at all. Mostly our business is done by grown ups. Most of my customers are just middle-aged people.

Q. What do you mean by that you don't sell much to minors? Is the reason that you get them out as fast as you can?

A. That is right.

Q. You don't want to sell to them?

A. No.

Q. How does a minor get to look at a book in there to see if he wants to buy it?

A. He doesn't look. We don't give him a chance.

Q. You don't want to sell to him, is that right?

A. No.

Q. No matter what book he wants to buy?

A. Well, unless he picks up something that is within the, like, well, say, a book like a comic book or something like this. I would have no objection to that or any book, something like it.

Q. You don't have any objection to the minors looking at those books?

A. No.

Q. You don't want them to look at anything like Exotique or Ladies' Man or anything like that?

A. They can't touch it. The minute they lay a hand on it, the man is right on top of him.

[fol. 372] Q. If you have never read Exotique, what is there about it that you don't want the juveniles to handle?

A. Knowing the character of this kind of magazine, so we know it. We don't let them do it. That is all. So we don't take any chance.

Mr. Doran: Your witness.

Redirect examination.

By Mr. Fleishman:

Q. When you say "knowing the character of this type of magazine," Mr. Smith, what do you have in mind?

A. Well, what I have in mind, it's mostly for grown-ups.

Q. Did you mean that you thought that that magazine was obscene?

A. No. It's not exactly, but it's not for kids to read.

Q. Do you believe it's obscene at all?

A. Not what I know of.

Q. Do you have any reason to think it's obscene?

A. No.

Q. In other words, what you have in mind is that there are a lot of different people, and some people like different kinds of things, is that right?

Mr. Doran: Objected to.

The Witness: That is right.

[fol. 373] Mr. Doran: Objected to as leading.

I move to strike the answer, if any.

The Court: We'll strike the question.

Do you buy general books from New York, used books? They don't send a catalogue out of old used books?

The Witness: Yes, they do.

The Court: By classification?

The Witness: It doesn't mean to say they are seconds and they are being used.

The Court: I mean, your other stock of standard used books.

The Witness: Well, what they have is what they call, they put certain books that don't sell. They are new books. They are not being handled.

The Court: They are from the publisher's house?

The Witness: That is right. And there are companies that buy those books, and then they send those circulars, and they sell it.

By Mr. Fleishman:

Q. This Exotique, does that come through the mail, too?

A. Yes.

Mr. Fleishman: I have nothing further.

The Court: I have nothing else.

Is that all, Mr. Fleishman?

Mr. Fleishman: Yes.

There is just one thing, if your Honor please, and I [fol. 374] meant to discuss this with Mr. Doran and failed

to. I was wondering if it would be agreeable if we could incorporate by reference the testimony and the offer of proof of Robert Kirsch and Dr. Gross, both of whom I'd like to call. However, since the ruling would be the same, it would be a burden.

Mr. Doran: Oh, surely. I'll stipulate that he went through the same procedures with each of the witnesses as to all of his defenses.

The Court: What was the other man's name?

Mr. Fleishman: Robert Kirsch and Dr. Gross.

The Court: All right. We'll understand that Mr. Kirsch and Dr. Gross have been here, and you have made the offer of proof and an objection has been sustained.

Mr. Fleishman: That they would testify as they had.

The Court: The same as you represented before.

fol. 377 Appendix

(Proceedings had on Thursday, September 19, 1957, in the matter of People versus Lauro J. Neri, case Nos. 57898, 57899, 57901 and 57905.)

Mr. Fleishman: The defense will call as its first witness Mr. Robert Kirsch.

Mr. Doran: Do you stipulate to the presence of the jury, counsel?

Mr. Fleishman: So stipulated.

Mr. Doran: The People so stipulate.

Robert R. Kirsch, called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please.

The Witness: Robert R. Kirsch. K-i-r-s-c-h.

Direct examination.

By Mr. Fleishman:

Q. Mr. Kirsch, for the record, will you tell us where you reside, please.

A. 9848 Portolo Drive, Beverly Hills.

Q. Are you married?

A. Yes.

Q. Do you have any children?

[fol. 378] A. Yes.

Q. What is your occupation?

A. I am a daily book columnist for the Los Angeles Times and a teacher at U.C.L.A.

Q. For how long a period of time have you been reviewing books?

A. I have reviewed books for about 10 years.

Q. For how long a period of time have you been working as a critic for the Los Angeles Times?

A. A little over two years.

Q. Can you tell us a little bit about your educational background, Mr. Kirsch?

Mr. Doran: Your Honor, under ordinary circumstances it might be a little premature to object.

The Court: It is. I don't know what he is going to testify to. I presume he is laying a foundation for something.

Mr. Doran: Very well.

By Mr. Fleishman:

Q. Do you have the question in mind?

A. No, I don't.

Q. I asked you to tell us something about your educational background.

A. Well, I have a Bachelor of Arts degree in English Literature from U.C.L.A., a Master of Arts degree in English Literature, majoring in American Literature from U.C.L.A. [fol. 379] and I am a candidate for the Ph. D. at that institution.

Q. Have you completed any of the work toward your doctorate?

A. I have completed all the work with the exception of the oral examination.

Q. Do you belong to any professional association, sir?

A. I am a member of the Modern Language Association, the Association for Education and Journalism, and Phi Beta Kappa.

Q. You mentioned earlier that you teach. Where do you teach and what do you teach?

A. I am currently teaching at UCLA two extension courses in creative writing.

Q. Now, how long a period of time have you been connected with UCLA?

A. I have been on the staff at UCLA since 1950.

Q. Have you taught at any other universities?

A. Yes. I was a visiting professor for one year at USC.

Q. Tell us some of the qualifications that are called for for your work as a professor at UCLA.

A. Well, in order to teach creative writing, one must have some experience in this field. One must be aware of the literary traditions, of the schools of criticisms, the techniques, the styles and so on. One must have a thorough grounding in such matters as history and cultural traditions, a variety of subjects which are called the humanities.

[fol. 380]

Q. Do you have the qualifications in these fields as you have explained them?

A. I believe so.

Q. You have done extensive studying in these various fields?

A. Yes, I have.

Q. And reading?

A. Yes.

Q. Have you ever written any articles or works of fiction?

A. Yes, I have.

Q. Will you tell us about the articles that you have written.

A. Well, I have written a number of so-called scholarly articles, which appeared in the year book of the Claremont College Reading Conference and other publications of that kind. I have had articles in Script Magazine and This Week and in a great many newspapers.

Q. You say you have done fiction, too?

A. Yes.

Q. Tell us something about that.

A. I have written short stories, which have appeared in [fol. 381] Story Magazine, New World Writing, American Weekly. I think that is about it.

Q. Can you tell us something of what is involved in your work on the Los Angeles Times as a literary critic.

A. Well, basically I have to read from 20 to 30 books a week. The books are sent to me by the publishers, and from these books I select five or six to review in a week. I try to cover one book in each column. Occasionally I do more than one book.

Q. Now, you have told us a little bit about your teaching activity. Can you tell us a little more about that.

A. Well, in connection with my courses at UCLA I am obliged to read a fair number of current periodicals. Part of the function of a teacher of creative writing is to guide the students in terms of the current market, and occasionally I read for pleasure.

Q. You say you read approximately 30 books a week. Can you tell us whether these are novels or non-novels or what.

A. Well, they range in the field of fiction and non-fiction. Under fiction I would read novels, collections of short stories, plays. Non-fiction, biographies, history, books on politics, books on current affairs and so on.

Q. Now, Mr. Kirsch, based upon your education, your [fol. 382] training, your teaching, and your experience, and your work, do you believe that you are familiar with the contemporary community literary standards?

A. I believe I am, yes.

Q. Can you tell us what those contemporary community literary standards are?

Mr. Doran: Just a moment. To which I will object, your Honor, first, on the ground that whereas the witness has testified as to considerable experience of his own in reading many things, there doesn't appear to be in his testimony anything to indicate that he would know what other people are reading; second, on the ground that under the authority of People against Wepplo, opinion evidence or so-called expert testimony is inadmissible in a case of this nature.

Mr. Fleishman: If your Honor please, just so I can take care of the foundation point and reach that one first.

Q. Are you familiar, Mr. Kirsch, and are you familiar as a result of your training, your work, your education, and your teaching, with what other persons are reading in the community?

A. Well, as I view my job as a critic, I must be aware or I must see that I am aware of some of the factors mentioned by both you and the other gentleman. I keep up with publishers' weekly, the best-seller list, the annual statistical [fol. 383] report of the public libraries, and the statistics on book sales generally, so that I know or I have a fair idea of how many people are reading which books in the country.

Q. In any event, you know just about as much as anyone does know in that that is part of your work, is that the fact?

A. Yes.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Fleishman: Shall I repeat the question or let that question stand?

The Court: Just a moment, until I see what I have here.

Mr. Fleishman: Surely.

The Court: I was just wondering upon the admissibility of testimony of an expert in a case where the only point at issue is the obscenity or indecency of a publication, and the effect of obscenity and indecency is not to my mind to be known only within the mind of a literary expert.

It's the effect upon ordinary common individuals who make up our body politic and our population.

Mr. Fleishman: Surely, your Honor.

The Court: It would seem to me that persons of very limited knowledge and understanding would not have to have an expert tell them that something that they have read is a very bad thing to read and what effect this thing would [fol. 384] have upon them. The intent of the ordinance is to protect the mass of people from being confronted or having groups of the people who might not use good judgment and prudence in what they read and who might select things that are harmful because they are put out before their eyes in a rather attractive manner.

It seems to me the field of an expert, which I was just seeking here—

Mr. Fleishman: May I be heard a moment?

The Court: (Continuing) —is not that.

Mr. Fleishman: So we would be in sharp focus—

The Court: Pardon me?

Mr. Fleishman: May I be heard for a moment, so we will be in sharp focus?

The Court: Because, give me a moment, so I'll find what I'm looking for.

Mr. Fleishman: I think it's 36.

The Court: It's 33.

Mr. Fleishman: That is close.

The Court: All right. Shall we continue? You have something to say?

Mr. Fleishman: Yes, your Honor.

The Court: I was going to conclude my remarks by simply asking you for any authority that you have which holds that in issues where the only issue is that of the nature and character of a publication which has been de- [fol. 385] scribed and alleged to be obscene and indecent, where when that is the issue to be tried, that expert testimony is in order and is admissible and competent in such an issue.

Mr. Fleishman: Yes.

The Court: I'll be glad to hear any authority you have.

Mr. Fleishman: The authority we view as the highest that can be is the United States Supreme Court. Your Honor is, of course, familiar with the recent case of Roth versus United States, where the Supreme Court says that the test of obscenity must be that which is offensive to contemporary community standards. This was the test they laid down.

The Court: That is right.

Mr. Fleishman: As your Honor knows, this is what we are trying to develop.

The Court: That is right.

Mr. Fleishman: As your Honor knows, this test was drawn from the American Law Institute Model Penal Code in which they after many years redefined and reworked the definition of obscenity and then defined it, and in their definition they stated that in a case where the question of

obscenity arose, experts, literary experts, should and have to be admitted to testify, because when you measure the work in terms of whether or not it is within or without contemporary community standards, none of us who are not working in the field all the time know what these com- [fol. 386] munity standards are. Mr. Kirsch doesn't know the law, but I don't know literature the way he does.

Mr. Kirsch is here for the purpose of telling us as much as he knows, and I am sure he would be the first to admit he doesn't know nearly all there is to know, but he is here to tell us all that he knows about the contemporary community literary standards, and we respectfully submit that we have shown by his background, his training, and his education, that he has sufficient knowledge so that what he has to say would be important and beneficial to his Honor, to me—I know I have learned a great deal—and I believe to the jury.

The Court: The two publications that you're submitting as authority, that is, Roth versus the United States, in that case, as I recall having read it, there is no holding there that it is admissible. It had been admitted in that trial. That was in New York, I believe.

Mr. Fleishman: That is correct.

The Court: It had been admitted in that trial, and the issue of whether it was admissible or not was not raised. It was offered by the defendant, and the appeal was from a verdict and a judgment. He had been convicted.

Mr. Fleishman: That is correct, your Honor.

The Court: And the Court simply, in commenting, said that he had the benefit of expert testimony. They didn't say that it was proper and necessary thing; and it having [fol. 387] been offered on the side of the defendant and the defendant was seeking the benefit of it, it wasn't in a position as if the People had offered it and there was a complaint about it on the part of defendant and he was contending it was wrongful to admit it. It had been admitted on the part of the defendant, just the same as any evidence that favors a defendant and is received in a trial and issue at law, even though the Court may be way in error in having admitted it, and even though it may not be admissible at all, but if it favors the defendant and has been

offered by the defendant, he can't complain because he sought to have it put in the record.

Therefore, he was given a wide latitude, which he was not entitled to. So obviously he can't complain about it.

Now, that is all that Roth says. I think you'll agree.

Mr. Fleishman: So far I can only agree with your Honor.

The Court: That is the way Roth treats it. If there is no decision on the part of the court that such testimony was fit and properly admissible and evidentiary

Mr. Fleishman: Where the court did do that and where it did it unequivocally is when it adopted lock, stock and barrel the American Law Institute formulation. Each of the judges who wrote on the question said that this defini- [fol. 388] tion that the Supreme Court has now adopted was drawn from the American Law Institute. That body makes it as clear as anything can be made that you not only can but you must introduce expert testimony. Otherwise a jury would be unable to do its duty.

Now, if we are correct that the United States Supreme Court did in fact adopt the American Law Institute definition, that it then did adopt necessarily the idea that experts are proper and necessary in such a case. If I am wrong in that, then I may be wrong.

The Court: I think you will agree with me in this: The mere fact that the court in writing an opinion goes ahead and writes at great length and judges give all their writings that they have been hoping to give to the world for a long time, they are not necessarily judgments. They become merely dicta. In this particular case it was an effort to upset the judgment and the judgment stayed. There wasn't a question that they should have admitted it and they didn't. The judges just simply picked it up and gave it as their opinion, upon which I don't believe there was even any argument before the court. There was no issue raised. If there had been an issue raised, right or wrong, and they had decided it was right, then it's in issue and they would decide it and would bind all inferior courts, and that means every court below the United States Supreme Court. But in People versus Roth it was in the record. They con- [fol. 389] sidered it in the record not as an error, but commented on it that that was in the record, and there isn't

anything that I see in Roth versus United States that helps us here at all except to say if we do admit it and the defendant is convicted, he can't complain about it. That is about all it says.

Now, as to the other, your American Law Institute, that is not the Code of California. That is a general code, which we hope some day as it's refined more and more and more the states can adopt it as a good code, so to not have these variations in the various states. It's always to be looked forward to, and it's a great work. We hope it will take place. But in California we have the opinion of our Appellate Department which says that it's not admissible. So I'm confronted with that. I can't go off on the theory and say, "Why, what beautiful things those fellows wrote. Here is where it was decided."

Mr. Fleishman: Judge, that is your decision. All I can do is tell you all the reasons that I earnestly believe that under the testimony if the Court is going to have to decide what are contemporary community literary standards, that they are entitled to the benefit of a person who studies in the field. Otherwise, they would be shooting in the dark, and they would be working on guess and hunch, that if we are going to have an objective rather than a subjective determination, you must have some fact and not [fol. 390] guess.

We have gone over the panel for some period of time, and it's perfectly plain that the jury is like you and I, Judge. We don't read that much. They don't know, and I believe that otherwise they will be unable to render a fair and just verdict insofar as they have to know what community standards are and do not know and will have no way of knowing.

I have nothing further to say. I said it pretty quickly, though.

The Court: Yes. I think you said it very well.

Rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study, and experience has become an expert in any art, science, or profession, and who is called as a witness, may give his opinion as to any such matter

on which he is versed and which is material to the case. Art, science, or profession, and that is not our test here. This is neither an art, a science, nor a profession. This is a publication which is alleged to have been obscene and indecent.

I don't think it comes within the purview of expert testimony. As I say, the Roth case didn't decide it.

The objection will be sustained.

[fol. 391] Mr. Fleishman: I'd like to make an offer of proof, and, depending on your Honor's wish whether it is in the presence of the jury, or not.

The Court: Do you have any objection to making an offer of proof in the presence of the jury?

Mr. Doran: An offer of proof as to the admissibility of testimony of this witness?

Mr. Fleishman: No. What the witness would testify to.

Mr. Doran: Of course I will object to that on the same ground that I objected to it on the opening statement.

The Court: Well, we'll have to sustain the objection, because it would have the effect, if the jury did not follow the instruction of the Court to disregard it, why, it would have the effect of coming in by another avenue.

Mr. Fleishman: That is why I was suggesting that I make it at the bench. I have the right to make the offer.

The Court: Come around, you two gentlemen, and make your offer of proof.

(Conference at the bench between the Court and counsel as follows:

Mr. Fleishman: If your Honor please, I respectfully suggest that the witness Robert Kirsch, who is presently now on the stand, if now allowed to testify, would testify that he is familiar with present day community literary [fol. 392] standards with regard to the writing about sex; that he would further testify that he has read Adam, Volume 1, No. 1, and that this publication is, in his opinion, within the commonly accepted community literary standards insofar as he knows them to be.

He would further testify that some of the stories in the magazine have, in his opinion, real literary merit; that, in his opinion, the reporting in the magazine is good;

and that the cartoons, in his opinion, are funny and within, again, the currently accepted community standards; and that there are articles in this magazine which are informative and educational. He would further testify that this publication, in his opinion, serves a social purpose in that it can serve as an avenue offering to budding authors and authors who have no other magazine available to them an opportunity to publish and to get their feet wet; so to speak, and get started, also permitting the discussion of things which may not be discussed as fully as perhaps they ought to be in more conventional magazines that are presently on the market.

He would further testify that the community standards have been changing; that over the last ten years there has been a very marked increase in all mass media regarding sex, a discussion of sex, and that the magazine Adam is a reflection in part of this fact; that is to say, that there has been discussion every place else; that there [fol. 393] would be new magazines which have that as an important part of their material.

He would also testify that he is familiar with the past experience with censorship and that the history of the application of the obscenity laws prove that they have been used in the past to suppress great art and literature, scientific treatises and works exciting social controversy.

He would illustrate some of these past mistakes, although, frankly, I am not familiar with them. The Bible, for example, has been condemned as obscene, as has Swift's Gulliver's Travels and others, and he is familiar with its history and would be able and willing to bring that fact to us.

Finally, he has with him a number of books—I don't know the exact number—which are all of them current best sellers, either on the best ten or at least that are popular and have been popular for some period of time, and that he is prepared to read to the Court and to the jury passages from these books which are as sexual and as erotic as anything that is found in this magazine Adam, and that based upon this and all of the other matters which we have stated, he would conclude that the magazine Adam is not obscene when the test is applied to it; that if he

were asked if in his opinion, and assuming the test of the obscenity of the magazine which is Adam by whether to [fol. 394] the average person and applying contemporary community standards that appeals predominantly to prurient interest that his answer would be that Adam is not obscene under that test.'

Finally, if your Honor please, I would like to have marked for identification and made a part of this record not for jury purposes the books that Mr. Kirsch has.

The Court: We'll mark them for identification for you for your record.

Mr. Doran?

Mr. Doran: I have nothing further.

The Court: Well, it's a very extensive and very well considered and very well elaborated offer, and I think the record will show it very clearly. Certainly, if there has ever been a test of this subject, he is getting it in this trial, although you're getting a great load here because our rules have been against you. I'll say this: I think that you're doing very valuable work for this community, because it has not been presented like this before, as you know. Nobody has done this. So although I think that this is not admissible, I can be wrong. I have been wrong before, and I hope if I am never wrong that I won't be here.

We'll have it in the record there, and the books, if you want them filed and marked for identification, but I don't think that the subject of expert testimony is [fol. 395] admissible, for this reason: If it took an expert to tell whether that was obscene or not, how would poor, simple minds ever get any obscene effect out of it? I'll tell you some stuff in there I don't think any man would say is decent, that tongue business. I never heard anything like it being offered as literature, and I have had to read a lot.

Mr. Fleishman: If your Honor please, I think you will find it in the best sellers that Mr. Kirsch has.

The Court: Well, I'll say this, that in some of the books reviewed in Time Magazine, some of them approach this, although it's much more beautifully handled, good English, and so forth, so that the vulgarity of it is beautifully portrayed.

Mr. Fleishman: May I get the books from him and bring them over?

The Court: Surely.

Are these your books?

The Witness: Yes.

The Court: How soon do you have to get them back?

The Witness: If I don't get them back very soon, I'm sure Mr. Fleishman will recognize them.

The Court: All right.

Mr. Fleishman: We'd like to have marked for identification purposes 1st in order Thy Wapshot Chronicle by John Cheever; Peyton Place, by Grace Metalious; The [fol. 396] Deer Park, by Norman Mailer; The Mandarins, by Simone de Beauvoir; The Big Nickelodeon, by Maritta Wolff; A Walk on the Wild Side, by Nelson Algren.)

The Court: Members of the jury, so your imagination won't run away with you, I'll tell you what we are doing. An offer of proof has been made, and to protect his record to show that he did have something to offer, we have to receive it, and mark it for identification, that is all, so that the record will show what it is that has been referred to had it been permitted. That is all. We have to keep those until the case is finally concluded.

Mr. Fleishman: In view of your Honor's ruling in the matter and the rejection of the offer of proof that we have made, we have no further questions of the witness.

I thank you for being down here, Mr. Kirsch.

The Court: You have nothing?

Mr. Doran: No, your Honor.

The Court: That's all. Thank you.

Mr. Fleishman: We have nothing further at this time, although we do have coming in tomorrow morning a psychologist. I rather expect we are going to go through a somewhat similar procedure but I think your Honor agrees it is probably best to have the man come down.

The Court: It is necessary, I believe.

Mr. Fleishman: Thank you, your Honor.

[fol. 397] The Court: Very well. You have nothing further tonight?

Mr. Fleishman: No, your Honor.

The Court: Very well.

Members of the jury, we'll take our evening recess, and kindly remember the regular admonition, not to discuss it among yourselves or permit any person to discuss it with you or form any opinion until it is submitted to you in the jury room. You have to keep your minds open until the last word has been uttered.

That will be 9:30, please.

Mr. Fleishman: That is very convenient, your Honor.

Mr. Doran: Fine, your Honor.

(Whereupon, at 4:20 o'clock p.m. an adjournment was taken until 9:30 o'clock a.m., Friday, September 20, 1957.)

[fol. 328] (Proceedings had on Friday, September 20, 1957, in the matter of People versus Lauro J. Neri, case Nos. 57898, 57899, 57901 and 57905.)

9:30 o'clock a.m.

Mr. Fleishman: If the Court please, the defendant calls Dr. Gross.

Mr. Doran: Do you stipulate to the presence of the jury, counsel?

Mr. Fleishman: Surely.

Mr. Doran: The People so stipulate.

The Court: Very well.

Dr. Zoltan Gross, called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please.

The Witness: Dr. Zoltan Gross.

The Clerk: How do you spell your first name?

The Witness: Z o l t a n.

The Clerk: The last name?

The Witness: G r o s s.

Direct examination.

By Mr. Fleishman:

Q. For the record, Doctor, will you please give us [fol. 329] your address.

A. 292 South La Cienega Boulevard, Beverly Hills, California.

Q. What is your profession or occupation?

A. I am a clinical psychologist.

Q. Will you tell us something about your educational background, sir?

A. Yes. I got my bachelor's degree at the University of California at Los Angeles in 1947; and I got my Ph.D. degree at the University of California at Los Angeles in 1952. During the course of my graduate training, I spent a year at the Illinois Neuropsychiatric Institute in Chicago, which is a division of the University of Illinois Medical School, for a year, during which time I spent approximately two months in diagnosing and examination of patients with mental disorders at Cook County Psychopathic Hospital.

Also during my graduate training I spent approximately three years in clinical training in the Veterans Administration in various institutions, such as the Los Angeles Mental Hygiene Clinic and San Francisco Mental Hygiene Clinic, the San Fernando Tuberculosis Hospital, and the Brentwood Neuropsychiatric Hospital. This is the Veterans Administration.

Q. Now, I take it in preparing to become a psychologist, you take specialized courses, is that correct?

[fol. 400] A. Yes.

Q. Tell us in addition to what you have said so far some of the particular courses you took while you were at school preparing to become a psychologist.

The Court: Would you stipulate to his qualifications, Mr. Doran?

Mr. Doran: I'll stipulate to his qualifications as a psychologist, yes, sir.

The Court: That is all you're asking. I don't believe any further examination on the qualifications is necessary.

Mr. Fleishman: If he is going to be permitted to testify. If your Honor please, I think it might be better in this case to develop the qualifications, because of what went on yesterday. I think we will have a better record, if your Honor please.

The Court: Well, I think if the stipulation is before the Court that he is qualified and that is in the record, it isn't necessary to prove his qualifications. If testimony is admitted, and if you believe that it's necessary to support that by showing peculiar qualifications, why, I think probably it would be in order.

Mr. Fleishman: I believe that is our situation here, your Honor.

The Court: Now I think he is past the period of his proof of qualifications to qualify him to answer questions [fol. 401] in our field if those questions are proper and whether the evidence is admissible. If we find it's admissible, then you can go on and spend the rest of the day if you wish showing his peculiar qualifications. If it isn't admissible, it wouldn't matter.

Mr. Fleishman: If your Honor please, I think that before the stipulation would become effective both sides have to accept it, and I think I'd prefer to qualify my witness in this case.

The Court: Very well.

By Mr. Fleishman:

Q. Tell us something about the courses you took in school, sir.

Mr. Doran: To which I'll object as irrelevant and immaterial in that the People have accepted the qualifications of the witness.

The Court: He has not entered into the stipulation, Mr. Doran. He prefers to prove it.

Mr. Doran: Very well.

The Court: Go ahead, sir.

The Witness: The special courses as a psychologist generally can be broken down into two major areas, such as I tried to indicate in my testimony just a moment ago, that, one, there is the clinical aspects of the work; that is where you have experience with patients, where you do work with patients, where you work under supervision and get training in terms of the kind of skills and arts [fol. 402] that you use in helping people out of trouble.

The second area of training is in the most formal academic and scientific areas, and in these areas I have had courses in statistical techniques, experimental design, in which we attempt to develop skills within the individual to make scientific studies of human behavior, where we can test out a number of assumptions that we might have or hypotheses that we might have about what might be affecting a group of people. The statistical designs range all the way from very simple kinds of things, where we attempt to get just simply averages of responses. By that I mean if we ask a number of people to react to a particular stimulus, say we flash a red light on and we simply want to measure how fast they can react to that, and we take, say, 30 people and get their reaction times, and we have an average.

There are other statistical techniques that become much more complicated where we measure a number of different factors interacting in the behavior of the person. For example, we want to know the effect of his age in a particular situation, the effect of his age, his education, his cultural, social, economic background, that is, how much money he is making now, that is, how much money his family had as a child, all of these factors, his religious affiliation, political affiliations, and all of these, too, can be measured in experimental design. We can by use of these statistical [fol. 403] techniques find out which factors among this variety play what kind of role in the production of his behavior. Is one a predominant factor, is one an important factor in the particular phenomenon that we might be studying?

In addition to the courses such as these, which are primarily experimental and scientific in terms of methodology, scientific methodology, we have courses in social psychology, child psychology, psychotherapy adolescence, reading disabilities, speech disabilities, physiological psychology, comparative psychology: that is the psychology of organisms, where we are interested in understanding the communalities of behavior within all organisms, the development of behavior from the smallest organism to the highest, human beings.

By Mr. Fleishman:

Q. Doctor, what you have been telling us about has to do with your formal training in school and before you came out to practice in the field, is that correct?

A. That is correct.

Q. Now, you have been using the term science. Is psychology a science?

A. Yes. It very definitely is a science.

Q. Tell us why it is.

A. Because it uses essentially the same methodology that all the sciences use. Science is defined by its method. [fol. 404] The contents of any field of knowledge exist irrespective of the method of obtaining what we might call truth or at least an approach to truth, and we use the same rules of science that the physicist uses or the chemist uses or the physiologist uses. We have our laboratories. We use controlled experiments. We validate our experiments, and we make them public. One of these factors is a thing that defines a science. In making our findings public, it provides an opportunity for co-workers in the field to repeat the experiment to find out if it's true in Los Angeles as well as in Chicago, for example.

These are the factors that make it a science.

Q. Now, Doctor, do you belong to any professional societies?

A. Yes. I belong to a number of them.

Q. Will you tell us which ones you belong to.

A. In psychology there is one large organization, and then there are a number of sub-organizations under it.

Q. What is that large organization?

A. That large organization is the American Psychological Association.

Q. Are you a member of that?

A. I am a member of that.

Q. What are some of the sub-organizations?

A. There is the Western psychological organization.

Q. You're a member of that?

[fol. 405] A. Yes. The California Psychological Association.

Q. Are you a member of that?

A. Yes. The Southern California Psychological Association, and I am a member of that. I am a diplomat of the American Board of Expert Examiners.

Q. Is that also a subdivision of the American Psychological Association, a diplomat?

A. Yes. The American Board of Expert Examiners in Psychology is a corporation of the American Psychological Association.

Q. Is there any special qualification to becoming a diplomat?

A. Yes.

Q. What are those special qualifications?

A. You have had to have demonstrated adequate professional ethical conduct five years post doctorly. You have had to pass two days of written examination and two days of oral examinations by senior members of the field, that is, in, for example, in this area the members of the field are professors in the various universities who have been in the field for, I think, 15 or 20 years.

Q. Now, approximately how many diplomats are there in the United States?

A. I think there are about 700.

Q. I take it from that that it's a fairly restricted group to persons who have been carefully screened, is that correct?

[fol. 406] A. Yes.

Q. Have you written any articles in the field of psychology, Doctor?

A. Yes, I have. Four publications.

Q. Now, would you tell us something about your work, Doctor, as a clinical psychologist.

A. As a clinical psychologist, my work generally breaks down into three different areas. First in research.

The Court: Don't you think you have given a fair understanding now of the position of the witness in his field?

Mr. Fleishman: Perhaps. There was one other point I wanted to develop.

Q. In your work as a clinical psychologist, your work with a large number of patients, is that correct?

A. That is correct.

Q. And the people you work with, are they the same as Mr. Doran and I and Mrs. Neri, or are they people who are in asylums?

A. The people I work with in my office by and large, with the exception, perhaps, of one patient, are people who are very much like you and I.

Q. In other words, they have their assortment of problems, and they come to you with them?

A. That is right.

[fol. 407] Q. They are not what we might commonly call crazy people?

A. No. They are not crazy people.

Q. In working with these people, I take it that what you try to do in part is to work with them so they can understand themselves better in relationship to the community in which they live, is that correct?

A. That is correct.

Q. As such, do you have to work with and know about matters that are going on in the community?

A. Definitely, for a variety of reasons. One is that it's important to understand and to know what the reality of the person's environment is, so that you can understand what kind of unreality he is bringing to it.

You see, when a person has emotional problems, he has sort of blind spots, areas that he almost literally cannot see and cannot understand, and when he interacts with certain aspects of his environment, for example, there are some people who have had problems with authority figures, bosses and professors and the like, and they are uncomfortable with them; they don't exactly know why, but they can't react in the same free, easy, spontaneous manner that they would react with their friends in, not in the same way but I mean the same sense of freedom that they would have with their friends. Of course, there are differences in the [fol. 408] relationship. Some people are so bottled up with this kind of person that they cannot react comfortably with, for example, this authority figure, the boss. In doing this, they sometimes become frightened of this person, and then they react in a defensive, uncomfortable, restricted manner, and it's important for me to know.

This is also true in the area of sex, for example. I mean people have problems in the area of their sexual relations. They cannot engage in sex in a free, healthy, spontaneous way because of their problems in this area, and it's necessary for me to understand and to know what the reality of sexual relations are, so that I can help them to understand it more accurately.

Q. I take it from what you have said, Doctor, that sexual problems are a prominent feature of the problems that come to you with which you are concerned to a high degree, is that correct?

A. That is correct.

Q. Is there a body of psychological literature dealing with sexual behavior and sexual standards in the community?

Mr. Doran: Pardon me. Just a moment. May I take the witness on voir dire?

(The question was read by the reporter.)

The Court: I don't see the relevancy of it. We have one on trial here where it's a magazine that is alleged to have [fol. 409] come within the prohibition of the ordinance. For him to tell us that there are some here would not add anything to it, because we have evidence here upon that very point.

Mr. Fleishman: That is not what the question is reaching. Perhaps I could frame a question that would be, perhaps, better.

Q. There are leading works dealing with sex that have been developed by psychologists and which psychologists use, is that the fact, Doctor?

A. That is a fact.

Mr. Doran: Again, your Honor, may I request to take the witness on voir dire?

The Court: Well, I don't see any occasion for voir dire examination there. His qualifications have been laid, don't you think, for a worker in the field that he has described?

Mr. Doran: Perhaps so, but I'd like to ask him several questions concerning the field.

The Court: When he completes it, then you can cross examine.

Mr. Doran: Thank you.

By Mr. Fleishman:

Q. Now, Kinsey's work is one of those kind of leading works, is that the fact?

A. That is the fact.

Q. Tell us some of the other leading works in the field, [fol. 410] Doctor.

A. Well, may I break it down again into various areas? There are works on sex in the area of anthropology, sociology, history, physiology, and theory. By this I mean, by theory I mean, works which theorize about sexual behaviors, that cut across all of these areas. The better the theory is, the more areas it will include.

Further, the breakdown can be made in terms of works in the area of statistical studies, experimental studies, of sexual matters and works that are primarily speculative or purely observational, where you sort of look and describe. In this area you have primarily works in anthropology, such as the works by Margaret Mead, Coming of Age in Samoa, by Mead, and works in this area.

In the area of history the most recent book in this area is the one by G. Rattray Taylor on Sex in History.

There are studies of sex in the whole area of theoretical that run all the way from Freud, Abraham, Feronczi, Lorand. It's a tremendous literature in this area. There are relatively few studies of sex that have been actually experimentally done. There have been a lot of observational works, but, there have been approximately 31 publications up to the present time in English on sex, and in about, oh, 20 in foreign languages. These are the statistical studies.

[fol. 411] The most prominent among those are Kinsey's Report, and Ellis' Folk Lore of Sex, which was published a year or so ago, and Ellis recently published another one called The Psychology of Sex Offenders, which came out in '56.

Q. Doctor, will you tell us something about the Kinsey Report. What were some of the findings made there?

Mr. Doran: Just a moment.

The Court: I don't think that will be relevant and material. He has shown he has a knowledge of the Kinsey Report. You produced him here as an expert to give expert opinion on a certain feature of this case.

Mr. Fleishman: Yes, your Honor.

The Court: That doesn't mean that he must give a book review of the Kinsey Report to the jury. If we find that the expert testimony is admissible upon the point in issue, then it will come question and answer, "In your opinion, Doctor," and so forth.

By Mr. Fleishman:

Q. Now, Doctor, are there scientific methods available whereby psychologists and other sociologists in related fields are able to measure scientifically attitudes of people toward certain social phenomena?

A. There very definitely are. These techniques cover a broad range of materials. We measure in a variety of ways. We develop questionnaires, which I'm sure all of [fol. 412] you have run into at one time or another in your life. We develop specialized tests, which evaluate the individual's emotional structure in relation to particular materials. Sometimes these things become very elaborate. These measurements become very elaborate in which we measure behavior in social situations. There are a whole range of techniques whereby we do get at and with good validity and high reliability the attitudinal structures of people in particular situations with regard to attitudes of a variety of sorts.

Recently, one of the most dramatic kind of studies has been in the area of race relationships, and a whole body of knowledge has grown up in the area of racial relationships in which we now have factual information rather than assumptions and prejudice. I do know that some of these studies have been used by social agencies, administrative agencies, in the government to aid these administrative agencies in making judgments within their field.

Q. Now, in this field of attitudes of people, Doctor, is there a difference between scientific knowledge and lay

knowledge, and by that I mean knowledge that a person believes he himself has from his own living but which is not scientifically tested?

Mr. Doran: To which I will object as constituting an opinion of the expert.

[fol. 413] The Court: No. I think he could safely answer that question. I would assume it to be true.

Mr. Fleishman: I would think so.

The Court: Pardon me?

Mr. Fleishman: I would think so.

The Court: Yes.

Mr. Fleishman: May we have an answer?

The Court: You may answer, Doctor.

The Witness: Thank you. Yes. There is a very definite difference between knowledge and opinion. The thing is that in many areas of human conduct we have lived for such a long period of time in the belief that we have known things, and upon investigation and examination scientifically, we have found that these things just are not so and have released us from a tremendous burden that the suspicion or that the prejudice has put upon our shoulders.

By Mr, Fleishman:

Q. Doctor, these scientific methods that you have discussed for measuring attitudes, are these methods commonly used? I believe you indicated a minute ago some of the uses, but tell us some of the areas where they have been used.

A. These techniques have tremendous usage in a variety of governmental agencies. I don't know of a single major governmental agency, except the Post Office, that doesn't use psychologists in the measurement of attitudes in a [fol. 414] variety of fields. I know definitely that the army, for example, the Hoveland studies on propaganda in World War II were used extensively by the army, and they are continuing to be used by the army, Navy, Air Corps. The State Department uses psychologists for essentially the same purpose.

In another area, our advertising agencies have large staffs of psychologists, investigating attitudes and opinions and ideas and beliefs of people in relation to various products. I recall when I was in Chicago I was approached by one of the large automobile manufacturing companies to find out what some of the attitudes and opinions were that entered into the purchase of one of the three low-priced cars as opposed to the others. So that there are tremendous amounts of money.

I recently read an article—I can't recall exactly where. It was in one of the lay journals, I think in The Republic—in which they noted that approximately three billion dollars was spent on advertising before the war, approximately ten billions are being spent now, and a large portion of this money is going into the area of motivational research.

Q. Doctor, could this method, in your opinion, this scientific method, be used to answer a question such as, does a particular magazine to an average person, applying contemporary community standards, appeal predominantly [fol. 415] to prurience? Could such a question be answered in part scientifically by the methods you have described?

Mr. Doran: To which I object.

The Court: You may answer that in his opinion if it does.

The Witness: Would you restate the question, please?

(The question was read by the reporter.)

The Witness: It's a large, complicated question.

By Mr. Fleishman:

Q. Let's not ask complicated questions. The subject is hard enough.

A. May I—

Q. Just a minute. No. Assume, Doctor, that the question is whether a particular magazine falls within or without contemporary community standards. Could the scientific method that you have described shed light on whether or not this particular hypothetical magazine is within or without contemporary community standards?

Mr. Doran: Just a moment. I'll object to that, your Honor, on the ground that there hasn't been, as far as I can recall, one bit of testimony by this witness that he knows anything about contemporary literary standards. He is attempting to qualify him for what would appear to be another aspect of testimony. Also, that is irrelevant and immaterial.

[fol. 416] The Court: He hasn't been asked whether he has scientifically determined and ascertained contemporary literary standards. I don't know whether that comes within the field of a psychologist or not to know contemporary literary standards.

Mr. Fleishman: The question now is contemporary community standards, your Honor.

The Court: All right. I'll change my wording. Contemporary community standards.

Mr. Doran: I'll interpose the same objection.

The Court: If I have heard him correctly, his work is entirely in the psychological field in clinical work, that is, persons applying, I presume they apply, that are brought in there for certain psychological studies and analysis and recommendations for treatment. I wouldn't use the word "treatment." For a subsequent order of life. I believe that is his field as he has defined it.

We have here a little different subject. We have the subject of the effect of a certain thing upon the public from the standpoint of whether or not it is obscene, indecent, offensive to the senses. I don't see where the psychologist helps us any.

I listened with a great deal of interest, and in fact it may be my personal desire to listen to him, because it's always a pleasure to hear a person speak about the field in which he [fol. 417] works when he is informed, and it's been a great pleasure to listen to Dr. Gross, but I don't think that we are getting to the point that we are concerned in, whether or not an expert testimony upon the question of whether a thing is offensive or obscene is within the field that he has defined.

Mr. Fleishman: If your Honor please, just again may I be heard?

The Court: Yes.

Mr. Fleishman: The question, as your Honor has said, is whether or not a particular magazine, Adam, has a particular effect upon people. The question now so far is directed solely to whether or not there are methods available to determine knowledge. We haven't yet reached what conclusions have been drawn, but merely whether there is a better way of going about it than Mr. Doran has of just throwing it in. If there are methods available, this is what we want to develop. This question is the first of the series going forward, your Honor.

The Court: Our test here, we submit it, sir, to persons who are ordinary, prudent persons, those who use good judgment and sound discretion and are not affected by bias and prejudice. Now, I can say this, that I believe in the ordinary course of my experience that I have met many excellent persons in their fields of work, scientists, and so far as I knew they were doing well, but whether they would [fol. 418] measure up to the standard of being the ordinary prudent person, I don't know. I have seen some things about their conduct outside their laboratories that raises a question in my mind if they had good sense. Yet they were well qualified within their field.

It seems to me, Mr. Fleishman, that we are getting into something like this, if I could use this as an illustration: Are you familiar with Washington Irving's Knickerbocker History of New York?

Mr. Fleishman: Somewhat, your Honor.

The Court: Good. Are you, sir?

The Witness: Somewhat.

The Court: All right. You remember in that case before the British occupation of New York the Dutch lived in New York, and there were Dutch governors, and from time to time the government of Holland sent over a new governor to develop the Dutch people in New York, help them expand, occupy the territory, so that America could become a Dutch annex. They did very well.

Then they sent over a man who was scientific, and when he arrived he saw a great error on the part of the Dutch people. The Dutch people thought they were happy and contented and that they were prosperous and they were getting along excellently, but he as a scientist could see

that they were very unhappy. So he started out with discussions with the Dutch people, and when he got through with the Dutch people they realized they never were happy [fol. 419] in their lives. They were very unhappy.

That, to my mind, is what we are doing here. We have prudent people here who are expected to draw an opinion. I don't know what opinion they are going to draw, but we may have a scientific opinion that might be different than what prudent people might reach, and I would say the governor who tried to disturb the happiness of his people was not a prudent governor.

Mr. Fleishman: I quite agree, and I am sure that the people rejected his unsound advice.

The Court: He didn't last long.

Mr. Fleishman: I'm sure of that. Nor would Mr. Gross' testimony last long if it didn't have persuasive power to reasonable, prudent people.

The Court: That is true.

Mr. Fleishman: Our point is merely this, your Honor: In any field, as we discussed yesterday, ordinary, honest, prudent people, a jury, can't know everything there is in the world, of course.

The Court: No, sir. You're quite right.

Mr. Fleishman: They have to at times listen to some people who devote their lifetime to a specialty. Mr. Gross comes in here, and he talks about what he believes based upon his knowledge, his education, his training. If he tells them that something is not obscene and they just think his reasons for saying that are foolish, they are going to say, [fol. 420] and properly, Mr. Gross to the contrary, "We find the other way." On the other hand, the jury may say, "By gosh, what Mr. Gross said there, what Dr. Gross said, that was pretty persuasive." They are not taking Dr. Gross' say-so for it. They are listening as prudent people, as they should, and they are saying as prudent people, "We now see what we didn't see before, because we hadn't thought about it." And this is all that we want to develop, not that Dr. Gross can set the standards for us. He can't. I wouldn't take his word for it any more than I would take a police officer's, but I do say this, that Dr. Gross has devoted his life to a field that is very close to what we are talking about,

and that the jury should hear what he has to say, take what makes sense to them, and throw the rest in the garbage can.

The Court: That may be true, Mr. Fleishman, but still who are the persons that determine the value and merit of anything?

Mr. Fleishman: Judge, you tell me that.

The Court: I'll tell you who they are. The law tells us it's the ordinary prudent persons. Now, take, for instance, the science of osteopathy. That started out, as I recall it, in St. Louis with Dr. Still, and if I remember correctly, his theory was that all disease came from the bone. Osteo was the bone. Osteopathy, disease of bone. And if I correctly [fol. 421] understand my friendly osteopaths now, although it is young to say historical fact, the osteopath now is given a full medical training just the same as any other person seeking to practice the science of medicine in the State of California.

Now, the same is true of the allopath and homeopath, two great studies of medicine. Allopath, something opposite and different. Homeopath, the same, treating with the same. And if I am correctly informed, there hasn't been an allopath or a homeopath in the State of California for years, because the State gives an examination after the medical school has given the education, and it must comply with accepted medical standards.

Now take the bar. It wasn't very long ago before they had well defined ideas for the education of the young men coming to the bar, and that has gone through a fine course of change, and it's very different. Take every single, solitary human activity. Specialists have come into the field. They have made some contribution, and the merit of it or lack of merit of it is decided by the users, the ordinary prudent people of the community. They are the ones whose complex and composite knowledge and human experience determine these facts.

Take, for instance, such a thing as, take personal injury cases. We select 12 jurors, and they hear all the medical testimony in the world, everything that is relevant and [fol. 422] proper to the case they listen to patiently, and then they go out. And is there anyone who can tell them what to do? The last argument and the instruction of the

jury, the words have just slipped my mind just as I reach for them, the sound discretion of the jury, that is the last thing that they are told, the sound discretion of the jury. One of the three pillars of our law is trial by jury. When it comes to a question of fact, it will be given to 12 selected persons from the body of the city or community, and after they have been put to all the interrogations that they can be given and are selected, taken out of the jury box, if there is any cause of bias or prejudice, and even after that a certain number are taken out without cause, and the residue is assumed and presumed conclusively to be a body of prudent persons, and they are the final judges of fact.

We have built one of our pillars on that, sir.

Mr. Fleishman: It's a sound one, Judge. We wouldn't try this case without a jury.

The Court: No, sir. I'm glad you would not.

Mr. Fleishman: Because it does tend to represent the community, certainly more than any one man can.

The Court: It does. This is the community, sitting right there in that box, those 12 persons.

Mr. Fleishman: The only question we have is between a well-informed community and a better-informed com- [fol. 423] munity, Judge. We think that the best results come when there is the maximum knowledge given to the community. Your Honor, of course, would agree with me that the interrogation, it appears that many of the jurors didn't have sufficient time to study. We don't. If I were sitting there, I don't know it either. We want to bring everything we think that can bring a bearing. We don't want to tell the jury what to do through a witness. That is their province. But we do want to tell the jury what people who have devoted their lives to specialized fields have learned in the field which touches and touches closely upon our problem.

Our problem is, what effect is this magazine going to have on average people, or whatever your Honor is going to instruct. Who can answer that better than a psychologist? Maybe there are people who can answer it better; I don't know, but, certainly, a psychologist can shed light on this question.

That is all we ask.

The Court: Well, I think Dr. Gross would answer this question affirmatively if he were asked if he didn't know persons in the same field that he is in that he believes equally qualified to disagree with him on many of his opinions.

Mr. Fleishman: We'd stipulate to that, your Honor, and I think Mr. Doran then should bring in the people who are [fol. 424] qualified and who have a point of view who support him.

The Court: It isn't a contest between the experts. It's a question of submitting the facts themselves to the community.

Mr. Fleishman: Yes, your Honor. I think your Honor knows my position.

The Court: Yes, I do. We have discussed it in and out of the court.

The Witness: Your Honor, may I comment here?

The Court: I guess you had better not.

Mr. Fleishman: No.

Q. Doctor, based upon your education, your training, and your work as you have described it to us, do you have an opinion as to what the contemporary community standards are concerning sexual behavior and sexual discretion?

Mr. Doran: To which I'll object, your Honor, as irrelevand and immaterial.

The Court: It will be sustained, Mr. Fleishman. I think we have discussed our reasons back and forth. Now comes the question which is proper after the discussion for the legal test of admissibility.

Mr. Fleishman: May we make a brief offer of proof at the bench, if your Honor please?

The Court: Yes. Of course. You may put it in the record if it doesn't come before the jury that will affect them, [fol. 425] anything you care to say, sir.

(Conference at the bench between the Court and counsel, as follows:

Mr. Fleishman: If your Honor please, we offer to prove at this time that the witness Dr. Gross if he were allowed to testify would testify that as a result of his work, training, and his work in the field, and his reading of literature,

that he has become familiar with what our present day community standards regarding sexual behavior and sexual expression are.

He would further testify that he has read the magazine Adam, and that in his opinion the magazine Adam does not go beyond what is commonly accepted sexual behavior or sexual expression in the community.

He would further testify that in his opinion there is no way of stating with any degree of certainty whether that issue of the magazine would have a substantial tendency to corrupt and deprave its readers by arousing lascivious thoughts or lustful desires.

He would further testify that those terms are themselves so vague, that they have within them so many variable judgments that it necessarily means different things to different people, and persons would necessarily differ as to the application of that standard, but that Adam, in his opinion, Volume I, No. 1, within the bounds of reasonable psychological certainty does not run into that category of [fol. 426] being able to corrupt or to deprave its readers.

The Court: Very well. The objection will be sustained. We'll proceed with the next question.

Mr. Fleishman: In the light of your Honor's ruling on the offer of proof made, we have no further examination of the witness.

You may cross examine, if you want.

Mr. Doran: I have no questions.

The Court: Thank you, Doctor, for coming.

Mr. Fleishman: The defendant rests, your Honor.

The Court: Any rebuttal, Mr. Doran?

Mr. Doran: No, your Honor.

The Court: You will proceed with the argument.

* * * * * * *

[fol. 431] Colloquy Between Court and Counsel

The Court: I want to go ahead and proceed with the whole thing so we can take it all at one time, Mr. Fleishman.

Mr. Fleishman: Yes, your Honor. The only thing I had in mind was in terms of trying to go through each of

the books even when perhaps many of the books would be outside of the case.

The Court: I have read them all.

Mr. Fleishman: I see, your Honor. Well, I think that still there are differences that they aren't certainly, I would think, all obscene. Be that as it may I think that we have, if your Honor please, several categories. I would like to address myself first to the category that is, perhaps, represented by "Bizarre" and "Exotique". Now, I would suspect, your Honor, that those magazines offended your Honor. That your Honor found them disgusting and found them highly objectionable. I would suspect that. I would suspect that most normal persons looking at that would have difficulty trying to understand what it is, why people would read this, what is the purpose of publishing this, and having generally, if your Honor please, a feeling of extreme dislike for this. I think it is a very understandable position. But I would like to call your Honor's attention to the fact that that does not make the magazines obscene under the present law as it exists. Because, as your Honor is, of course, familiar with the rule that it is the impact a magazine or a book has on an average, normal person, not an abnormal person; not an unusual per-
[fol. 432] son. And whateyer else your Honor may say about these—

The Court: Impact upon the person and whose attention it might come.

Mr. Fleishman: I beg to differ with your Honor. I think the rule is—I am satisfied that the rule is that it is the average, normal person. That is what the United States Supreme Court ruled, I think, in a careful reading of the Roth case and Alberts case, and particularly the current opinion of Mr. Justice Harlan spells out what was implicit in the majority, that it is the average, normal person and that alone. If it is not the average, normal person, your Honor, let's address ourselves to that for the moment.

Without conceding that into whose hands the book may fall, because we don't believe that it is the rule, but let's say it is into whose hand the book or magazine may fall. Your Honor then has in mind someone other than an average, normal person, presumably because I think we can

agree that the average, normal impact on the average, normal person of these magazines would not render it obscene.

The Court: No, they would throw it away about the end of the first page.

Mr. Fleishman: I agree. So that then your Honor is saying what is the impact upon some abnormal person.

The Court: No, not abnormal, necessarily, useful.

[fol. 433] Mr. Fleishman: Well, what is the impact upon a useful person then. Whatever the specific proof is. You see the reason for the rule, if your Honor please, that it must be the average, normal person that is being considered is the great importance that is placed upon the jury in this type of case and, as your Honor has referred to it many times, that the jury presumably is a section of the community, itself being the average, normal person, whatever that may be, is able to determine impacts better than a Judge and better than any one person. But implicit in that, your Honor, is they must be talking in terms of impact upon average, normal persons, because a jury is not qualified to consider impact upon little fragmentations.

The Court: No, I quite agree with you. In one way I understand your argument and I think it is very good. It would be what would be the judgment or conclusion of a group of normal, average persons, but it doesn't mean that the average, normal person has to read it. And the average normal person would pass upon the effect of it as to what it would do or what harm it would do coming into the hands of the general public. The general public has access to it. It couldn't be said that with a general public having access to it and being invited to purchase, that because they would reject it as not being desirable reading material, that it then would be left open for other persons who would be affected by it and who ought to be protected [fol. 434] from it. It is a police measure. It pertains to public morals, health and safety.

Mr. Fleishman: I understand that aspect, if your Honor please.

The Court: If it isn't that then why have any rule or regulation at all?

Mr. Fleishman: Well, that brings us to, of course, a separate problem. But the point I am trying to make here, your Honor, is a different one. Because what we have is merchandise which by definition—we are now talking about "Bizarre" and "Exotique"—by definition would not have the effect upon an average person which would render the merchandise obscene. It is only when we try and say but it will have some kind of an effect upon a segment of the population other and different than the average, normal person.

The Court: Well, I don't know, sir. You are using the language in such a way as to indicate that the only person affected by it is the average, normal person whom you and I both know would reject the instruments if they were induced to read as much as a page. They would reject it then as having no interest whatever because of the filthy character of it and they would quickly throw it aside, and would undoubtedly take some steps to prevent it coming to the attention of others or younger people who might be affected by it. As we know, youth has an inquiring mind [fol. 435] on everything. If it didn't have it would fail in its purpose in life of finding its situation where it is going to work and live. And because of that the police measures for public safety and morals and health, under which the theory of this ordinance was passed, must do its work, as I see it, and it can't be applied to those who are already vaccinated, you might say, by experience and by time. As I see it the thing that is attempted to be done is a protective thing, which the police—the police power is a protective organization, a protective work.

Mr. Fleishman: I will again call your Honor's attention though not to the fact that certain books may be offensive—

The Court: But if you will excuse me one minute more.

Mr. Fleishman: Surely, your Honor.

The Court: The average, normal mind, or the average, normal jury would be a thermometer, so to speak, measuring the heat or quality of the thing. And they do measure the heat or quality of it and still reject it as reading matter for themselves and leave it, if it is of a low temperature,

you might say, leave it for anybody who is interested in it. Just the same as the vast freedom of publication in the country which the laws seek to protect and which you and your argument are directing the subject matter and the attention of the Court to protect the right of people who express themselves, which is a right without which we [fol. 436] wouldn't be where we are, and if we should have it taken from us probably we would begin to defend, but because we are supported in part by the freedom of expression. Our Constitution says that. California says so. One provision doesn't leave it to inference or anything else. But I agree with it, it must be of an average, normal group of persons, an average, normal group of persons to determine the qualities of the thing. It doesn't have to be something that they want to go ahead and read. They are to measure it and determine its qualities. If they determine the quality is very low and comes within what we call indecent and obscene their adjudication of that is conclusive on the instrument.

Mr. Fleishman: I would like to take it just one step at a time, if your Honor please.

The Court: All right.

Mr. Fleishman: Your Honor has said that the average, normal person would disregard for himself and say that these magazines that we have been discussing wouldn't have the impact upon the average, normal person which would render it obscene. Your Honor has said that when you measure—

The Court: No, I haven't said that.

Mr. Fleishman: I am sorry.

The Court: Excuse me. I haven't said that. I said it is the average, normal mind that is measuring the quality of the thing and the average, normal mind, having measured [fol. 437] the quality would not pursue it further because it would reject it, because it was of such a material they would not care to give it the time because they would feel a debasing influence in it.

Mr. Fleishman: Let me start at the beginning. In California a book is obscene only if it arouse lustful desires,

lustful and lascivious thoughts, and by reason of arousing these lascivious thoughts, these lustful desires, has a tendency to corrupt and deprave a person.

The Court: Has the capacity to.

Mr. Fleishman: Has a substantial tendency to, not a capacity—a substantial capacity. Now, I say this, it means it has a substantial tendency to corrupt and deprave an average, normal person. Your Honor disagrees with me and says no, it can be a segment. That while it may not corrupt or deprave an average, normal person the jury might feel that it would have this tendency to corrupt or deprave youths and that might make it obscene. Is that correct so far, your Honor?

The Court: Well, substantially so, except I think we are getting off our line again. That the jury and the Court are measuring the qualities of the thing to see whether they come within the description of being indecent and obscene, indecent and obscene and does have a certain effect upon the mind of the reader. Now, persons of mature age and of normal condition and good healthy minds would [fol. 438] not pursue this material very far. Because in the ordinary practices and processes of nature things that come to the attention, whether they be garments to wear, whether they be thoughts to think, whether they be food to consume, goes through a selective process by which those things which are harmful in any way and useless in any way are rejected. Otherwise they would be carrying on their minds great burdens and loads that would slow them down and prevent their performing their duties. Now, to my mind the reasonable, average, normal person would reject this as obscene and indecent, that it was something that places a burden—a dark burden upon the mind and prevents the mind from having that luminous quality that the unburdened mind has in the pursuit of its duties or its practices or its intents, and—well, that is about all I have on that point.

Mr. Fleishman: Well, I am still trying to—just so we are talking about the same thing, your Honor. I am trying to separate what the books offer, the "Bizarre" and "Exotique". I think these are different groups.

The Court: That is right.

Mr. Fleishman: I think that "Exotique" and "Bizarre", and this is the only point I would like to get clear— .

The Court: All right, sir.

Mr. Fleishman: They wouldn't have a substantial tendency to corrupt or deprave an average, normal person by arousing lascivious thoughts or lustful desires because [fol. 439] for an average, normal person these things are foreign. They are reasonably meaningless, so that they create no impact upon the average, normal person. And your Honor could only find something obscene about them and criminal about them by then saying "But the impact upon a segment of the population is the one that the law still talks about, that as to this segment of the population it has a substantial tendency to corrupt and deprave by arousing lascivious thoughts and lustful desires."

Now, my point is addressed to that. First of all I say that if your Honor has in mind the youth as that segment of the population which may be subject to this lascivious thoughts and lustful desires and, therefore, have a substantial tendency to corrupt the youth, that your Honor could not find the magazines obscene by that measure because, as your Honor recalls, the United States Supreme Court in Butler vs Michigan held specifically and without any question that you may not measure the impact of a book or magazine upon youth because that would be to set the level too low. You cannot have youth be the testing grounds for magazines and books which are offered to the general public and the Court pointed out that if you wanted to protect youth then all you have to do is to have a statute which says that certain books and certain magazines may not be sold to or given to youth and thereby you can protect them without at the same time impeding [fol. 440] the free flow of books and magazines which, perhaps, by a reasonable classification may be thought to be bad for youth but not bad for the average, normal person. And this is where the United States Supreme Court drew the line as to that.

If I am correct so far, that it is not obscene when you measure these magazines by the average, normal person, that it is improper to measure it by youth, then, your Honor is going to have to resort to saying something like "But

it must have an effect upon adults who have some twist in their character," because your Honor is probably thinking that the magazines must have some appeal to someone, otherwise they wouldn't be on the market and they wouldn't be sold.

The Court: Well, I thought I already discussed that when I said I thought the examination by the Court or jury in determining the character of the thing was really like a measuring instrument, like for instance a thermometer, that the average, normal person reading the thing, and I thought I said would reject the thing at the end of about one or two pages because of the character of it and that the average, normal mind would not be willing, even for compensation, to read it because of the effect upon the mind of that kind of material. Take for instance "Sweeter than Life". Would you read it?

Mr. Fleishman: I have read it as part of my job, your Honor.

[fol. 441] The Court: Thank you, sir, for saying as part of your job. I read it because it was my duty.

Mr. Fleishman: And I say to your Honor with as much honesty as I can, and I think your Honor knows I have always tried to be at least as straight as I can—

The Court: There is no question about it.

Mr. Fleishman: I do not believe that book is obscene. I do not believe that book has a substantial tendency to corrupt or deprave persons by arousing lustful thoughts or lascivious desires. Now, I think there is much that can be said about the book that it is not good. I think that as a literary work it has much to go before it qualifies. But, your Honor, that book should be killed by the Saturday review or the New York Times Book Section, not by law. And this is the point I would like to make, your Honor: That there is a lot of merchandise put out every day, a lot of books, which form the same classification that your Honor would place this in terms of not by good standards, by good judgment, reaching out and saying that this has sufficient value to warrant our time and reading. But that doesn't make it criminal, your Honor.

The Court: If you have read the book, sir, you discovered the young woman in that case was a perfectly normal woman

and after the experience became a perfectly abnormal woman. Now, if that isn't acting upon a normal mind, that kind of a plot, I don't know anything that is. And we do [fol. 442] know, sir, we unfortunately have had many years of contact from time to time with this and we do know that a perfectly normal person, that on certain occasions, being subjected to certain things, become changed and altered. Now, I have heard this story—I have heard it so many times when I have been in a position as a Public Defender and I have represented them and I asked "How did you get that way?" and had the same story repeated time after time, being subjected to it. It is like intoxicating liquor. It affects some that are otherwise perfectly normal until the experience. And that book there, I thought, was a perfect illustration of a normal person, one whose thoughts were entirely different, had never entered upon that field, upon being subjected to it forcibly became an entirely altered person. The book, I thought, carried its own proof. And I cannot contemplate you or anyone else or myself reading beyond a certain portion of it if we didn't have to do it because of some duty to perform.

Mr. Fleishman: But I would say this, your Honor, I would say this, that having read this, and I really don't consider myself to be different than the average, normal person, that I could sit on the jury here too, that after having read that book I don't believe that I was either a better or a worse person. I don't think I was corrupted. I don't think I was depraved, and this is the point, your Honor, that I want to hammer home.

[fol. 443] The Court: I was depressed, sir. I was depressed, very depressed.

Mr. Fleishman: Your Honor, I thought I was wasting my time.

The Court: I know your point. You think I would reject it so quickly—I would. But remember, sir, I am not a young man.

Mr. Fleishman: I am not talking about you, your Honor. I am talking about myself. I am a young man and I am saying I wasn't corrupted. I wasn't depraved. And I don't believe that Mr. Doran was corrupted or that he was depraved or that any other normal person would become corrupted or depraved.

The Court: Yes, but we are in the position of physicians. Physicians are not expected to catch the disease in order to treat it.

Mr. Fleishman: I think in this area, your Honor, we are all subject to the same whims of fate. We are not special people, your Honor.

The Court: We try to keep ourselves from getting affected, don't we?

Mr. Fleishman: The point that I am making, your Honor, I think that this is the hardest thing we have to come to in this, because there are it is the easiest thing in the world to read a book and say "This is junk." "What is the purpose of having this book. Nobody is going to be hurt by suppressing this, by killing this book and by sending a [fol. 444] person to jail or otherwise punishing him for distributing it." That is easy. But this is not what the law says, your Honor. And the Supreme Court tried very hard in the Roth case in different ways to show it is only when there is an intent to have a corrupt influence, it is something like action when you have a nexus between the book and action, that is one thing. But because the book depresses your Honor, because you may think it is vulgar, coarse, bad taste or talks about things that ought not be talked about or describes actions that your Honor thinks that people who are decent people ought not to engage in, all of this, your Honor, all of this is a matter of personal taste, one way or the other. We take it or leave it. Some people believe one way, other people believe another way. But you have to say because this is what the California law says, corrupt or depraved corrupt or depraved. Now, your Honor, this is something that is awfully hard to show. Your Honor knows enough in this world, and I am sure your Honor is much more familiar than I am with it, there are a few things that you read we are talking about books and reading here now, by the time you read it you have a conglomerate effect upon the reader. Some people may say well, they may some people may learn things that they didn't know before and perhaps they ought not to engage in. Maybe they ought not. But that is not for your Honor to say and that is not for me to say what people ought to do. [fol. 445] Maybe there are actions in regard to sex that

decent people would say it should not be done and yet Kinsey tells us that half of the United States are doing things that decent people say should not be done. So you can't, for example, draw the line and say you don't like this and decent people don't do it. The question is, is there a substantial tendency to corrupt and deprave by arousing these lascivious thoughts by these lustful desires. Your Honor will know it is not just enough to arouse the lascivious thoughts and lustful desires; these in turn must come back and have a corrupting effect upon people. Corrupting how, changing them—

The Court: Again we come to an ejaculation. The thing you are saying that the test should be that the incorruptable (sic) man must be corrupted by the terms and I say, of course, that is ridiculous, because it isn't the test.

Mr. Fleishman: No, we are saying the average.

The Court: You are putting down the average, normal person, if he cannot be affected or corrupted then the thing does not have the quality that is condemned. And in saying so you are putting down and defining the average, normal person as one who would not be corrupted by it, so the incorruptible must be corrupted in order to reach your standard.

Mr. Fleishman: No, your Honor, I am saying this: That there may be some things—I don't know where the line is [fol. 446] there may be some things, some area where you can say fairly that an average, normal person viewing this would be corrupted by the view of it. I say that any book such as we have here, books such as we have here are a far cry from whatever that may be. I happen to be, perhaps, too familiar with the field because you work in it and then you feel that you know something on it, but strangely enough in this field, the more you work in it really the less you know. I feel extremely humble here, but I do know this, that when we were arguing the Alberts case before the United States Supreme Court and when the United States Government in the companion Roth case was called upon to defend the obscenity laws in terms of this corrupting and depraving effect, the only portion that they sought to defend is what they designated hard core obscenity. They didn't try to defend books somewhat like we have here. And

in order to show the Court what you had in mind by obscenity and what the Government could suppress legally and all that it could suppress legally were pictures—moving pictures, what we may call roughly the French postal card, and the Government put these exhibits to the Court—put them into a box and had them sealed and had them available to the Court and said "This is what we mean by hard core obscenity, and this is what we mean by what is suppressible," very careful to exclude the books. Why? Because a book such as "Sweeter than Life", has a diffused effect. [fol. 447] It doesn't have the impact that maybe a picture will have in terms, maybe a moving picture will have, the impact in terms upon the normal person. We are in an area if we try and do too much, if we try and suppress too much we will end up by being able to suppress nothing, because I can't really defend the suppression of a book like "Sweeter than Life" without at the same time endangering something like the Kinsey Report.

You say no, no there is no similarity because the Kinsey Report, you say, is a scientific work. It was done not for a bad purpose. The man has just gathered facts and he has found some things. If your Honor please, I daresay—

The Court: I would say that any man who seeks truth to determine factors and determine truth so that it can be used gives a worthy service, no matter what field he enters, because there isn't any field that doesn't affect the human race.

Mr. Fleishman: If your Honor please, I daresay that the Kinsey Report and Freud—we have no question that they can't be suppressed, yet in terms of corrupting effect, I would bet that they have more effect and what we call within this area, corrupting effect than these books. Because what does Kinsey do? Kinsey tells us that a lot of people, people who go to college and respectable people, have been engaging in acts of what the law calls sexual perversion— [fol. 448] many people. The statistics are tremendously high on that. What is that doing in terms of a person reading this and saying "By golly, if all these people are doing that maybe there is something to it. Maybe we ought to try it."

Now, what I am saying, your Honor, is that you can't permit science to grow. You can't permit the free inquiry into the scientific field if you suppress it when it is turned over into the entertainment field because the Supreme Court has held in the Winters case that anything that can be put down in writing in terms of scientific exploration must be allowed to be stated in the same fashion—stated in the entertainment field because the area of entertainment, there is more learning, very often, or there is as much learning in entertainment as there is in going to college. So that the point is that if there are practices described in "Sweeter than Life" that your Honor doesn't think is proper and would say that normal people ought not to engage in them, fine. That is a personal thing. But if Kinsey is to have the right to say people do engage in them, people do these things, then it must have the right to put that into a novel. Because there is no logical difference. You say one is done better than the other. Fine. But the Court cannot be set up as a board of literary critics—

The Court: I don't want to be, sir.

Mr. Fleishman: No, I know your Honor doesn't. Nor [fol. 449] could the courts perform that function.

The Court: No, I don't think they could. They would all disagree among themselves.

Mr. Fleishman: That is true, your Honor. And yet that is essentially what we are coming down to. If "Sweeter than Life" had a more skilled writer and said everything that was said in "Sweeter than Life" in a more skillful fashion then we would have a different problem. What does that mean? It means that because of the lack of the artistic skill in the writer there is going to be a criminal condemnation.

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[fol. 496] Now, the third and the final point that I want to make in this connection, your Honor, is the element of contemporary community standards which the Supreme Court has injected for the first time. Now, we may not like where America is going, but I submit, your Honor, that contemporary community standards includes every single thing that we have and more. Your Honor is fa-

miliar with a book, "Peyton Place." It is the best seller of the decade. It has sold more copies than any number of good books have sold. It is presently in a paper edition, to be picked up in every single store in the country, in drug stores, in grocery stores and what you will.

Your Honor, "Peyton Place" describes sex, sexual subject matter, and in detail that exceeds anything that is in any of these books or in all of the books in toto, in truth. Now, if I may just read, and again for the same purpose, in terms of getting to the hard heart of it, I read the book over again last night and I picked up seven portions which I felt went beyond or certainly included everything that we have here.

Without really trying to do more than make a point once, I would like to read from page 202 to 203, and ask your Honor as you are listening to this whether there is anything in these books which really does more than we find here in "Peyton Place."

[fol. 497] This is a scene between two minor children: a young boy, Rodney, and the girl, Betty. It starts:

"'What's the matter, honey,' she asked softly, running her fingertips over his bare chest. 'You mad, honey?'

"Rodney exhaled his breath sharply. 'No,' he said, 'I guess not.'

"'Kiss me then,' she said prettily, petulant.' 'Kiss me to show me you aren't mad.'

"With something that was almost a sob, Rodney turned to her. This was a thing he could never understand about Betty. For hours she could act as if the last thing she wanted was for him to touch her. She could make him feel as if she did not even like him particularly. But the minute he kissed her, she began to make small sounds in her throat and her body twisted and turned against him as if she could not get enough of his kisses. This was the moment he waited for every time he saw her. It made everything else bearable, from the way she taunted him with her other boy friends to the way she teased him by pretending not to like him.

"'Quick,' she said. 'Down on the beach.' Not here.'

"She ran ahead of him and he followed, carrying the car robe. Before he could get the blanket smooth on the soft sand, she was lying down, holding her arms out to [fol. 498] him.

"'Oh, baby, baby,' he said. 'I love you. I love you so.'

"She nibbled hungrily at his lower lip. 'Come on, honey,' she said, and her body moved ceaselessly. 'Come on, honey, love me a little.'

"His fingers found the tie of her halter, and in less than half a minute the garment lay on the sand next to the blanket. Betty's back arched against his arm as she thrust her breasts up to him. This was not new to Rodney. She let him do this often, but it never failed to arouse him to near frenzy. Her nipples were always rigid and exciting and the full, firm flesh around them always hot and throbbing.

"'Come on, honey,' she whimpered. 'Come on, honey—'"

The Court: May I ask you, is that supposed to be a standard for people to write by? It isn't a law. It is a mere example of what I would say might be another violation. I don't know what the purpose of the book was—

Mr. Fleishman: My point—

The Court: —certainly not a standard for us.

Mr. Fleishman: Your Honor—

The Court: The standard that we draw is whether it is obscene and indecent.

[fol. 499] Mr. Fleishman: Your Honor, I am saying that "Peyton Place" is sold in every drug store in the County and in the City.

The Court: That's true.

Mr. Fleishman: It is a best seller and has been a best seller for over a year. It has sold more copies than any other single book in the last ten years.

Now, what I am saying, without reading on further, is that whether we like it or not, this is what—

The Court: It isn't our standard, Mr. Fleishman. Has anyone given authority for that to be the standard of literature of that type?

Mr. Fleishman: I do believe, your Honor, that when a book has achieved this type of recognition that standard

is a double thing. Standard, if we are talking in terms of is-this-what-we-like, I think we can talk about it.

The Court: No, I am not saying that.

Mr. Fleishman: The second thing is that this was accepted in society. I say yes, it is accepted. It is accepted in a twofold fashion: first of all, that it is presently and completely distributed throughout the United States in the hugest quantities; and, secondly, your Honor—and this is significant—it is purchased. It is purchased in such large numbers as to almost prove that we do have—whether we like it or not or whether we should or should [fol. 500] not—we do have in America a kind of obsession with sex; that anything really that has to do with sex becomes interesting to us.

Now, I think that in a way—and this is really talking on a different level—in a way this comes from our attempt to restrict it too much. The attempts to sit too heavily upon sex expression has had its own bad reaction in terms of forcing persons to perhaps give it more emphasis than it should have; and I do believe truly that if there were greater freedom and there were not so many suppressions against sex discussion that people wouldn't be so obsessed with it. But that is another point.

But in the terms of standard, your Honor, I don't know how else we find out what standards of the community are except to see what they do. Now, what they do with regard to "Peyton Place" is to read it in numbers unheard of and sell it every place, through the mails. Your Honor can take judicial notice of this. It is one of the books that have been up on the Best Sellers all year, for an entire year. It is in a paper back edition. Your Honor can go to any drug store now and pick this book up. So that it reaches a much wider audience than these few books and in these reasonably big book stores where there are just books that are being sold in hard covers.

So that again in terms of standards I believe that this sets a standard in the sense that this is what is going on: [fol. 501] not what ought to go on, but it certainly tells us in part what is going on. And I would appreciate it if your Honor would—I have marked the pages here.

and perhaps it would be better if your Honor would just read them privately here and see—

The Court: No. It isn't a standard, Mr. Fleishman. I am not bound by that book.

Mr. Fleishman: It is not that you are bound by the book, your Honor. I think you are bound by the fact that "Peyton Place" has been a best seller in America for more than a year, that it has sold more copies—

The Court: Has it been put to any test to discover whether it is a violation of our City ordinance?

Mr. Fleishman: If it hasn't, your Honor, that, itself, is a kind of proof of having been accepted, because any work which has been so widely distributed, if it were in fact considered to be obscene, it would almost certainly have been put to a test. The fact that it is even circulated freely in Boston, if your Honor please, is a kind of test of it's acceptance. This is no book that is put out clandestinely. It is a book that is sold openly and all over. And we believe most earnestly that it does in a way set a standard of what is done, not what ought to be done.

The Court: Are you familiar with Marie Corelli?

Mr. Fleishman: No, I am not, your Honor.

[fol. 502] The Court: There was a writer of material of that kind who had very wide circulation. She herself, in one of her latest books before she passed from the scene—a great authoress—described the effect of that material on young people. It was a description that is a standard description.

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[fol. 513]

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The Court: Mr. Doran.

Mr. Doran: Well, your Honor, I think the subject has been pretty well covered.

I have no comment unless your Honor desires some discussion of some particular point. Other than that, all I can say is that apparently if we take Mr. Fleishman's argument for what it appears to be, then these book merchants are a lot more important people than any children.

The Court: Well, first let me say that I spent a long time on these instruments. I found I had no time here; so I took them home. And I believe that as to the books, I reviewed them three times. And I want to say that the effect on me was one of depression. I would not choose to read such material, and I think the ordinary [fol. 514] prudent person who had some of these books come to his attention would read possibly a page in some cases.

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[fol. 519]

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Now we will take these here. The worst of all, I think, was "Sweeter than Life." That I read twice, and went back and reviewed it. And "Sweeter than Life" I thought was depravity. Just straight out depravity, with no redeeming feature. It carried no plot. It didn't even explain why the woman in the book had separated from her husband; they just separated, leaving her with the secretary, young woman secretary, and her designs thereafter, which she carried out. It is true that she had some contact with a man. I don't know whether this was intended to be a lift up from the depths to which she had gone before or what it was. But it was there.

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[fol. 535]

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Mr. Fleishman: Yes, your Honor. To be helpful, perhaps all that is left now in the Smith case is "Sweeter Than Life."

The Court: That is Count VII.

Mr. Fleishman: Yes, your Honor. And an Exotique. As to Exotique, we believe that the charge cannot be sustained because it is just charged as "Exotique." There is no number mentioned. That is to be found in Count III of the Complaint, your Honor.

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[fol. 540]

JUDGMENT AND SENTENCE

The Court: Well, then, Mr. Smith, you are adjudged guilty of the charge set forth in Count VII, which says that on or about November 19, 1956, at and in the City of Los Angeles, County of Los Angeles, a violation of Section 41.04.1 of the Los Angeles Municipal Code was committed in that you did have in your possession obscene and indecent writing, book, pamphlet, picture, and so forth, to wit, a book, designated "Sweeter than Life" in the place of business where magazines, pamphlets, papers and pictures were sold and kept for sale.

It is the judgment of the Court that you be confined in the City Jail for a period of 30 days.

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[fol. 560]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES
APPELLATE DEPARTMENT

No. Cr. A. 3792

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ELEAZAR SMITH, Defendant and Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 17, 1958

I

Notice Is Hereby Given that Eleazar Smith, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles, entered herein on the 23rd day of June, 1958.

The Appellate Department of the Superior Court is the highest state court available to appellant. (California Constitution, Article VI, 5; *Alberts v. California*, 354 U.S. 476).

This appeal is taken pursuant to 28 U.S.C., 1257, subdv. (2).

Appellant was charged, in a seventeen count complaint, [fol. 561] with violating Sections 41.01 and 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000. The trial court found Appellant guilty of Count VII of the complaint only. Each of the other counts was either dismissed before trial, or defendant was found not guilty. Count VII of the complaint charged that defendant, on or about November 19, 1956, violated Sect. 41.01.1 of the Los Angeles Municipal Code in that he did wilfully and unlawfully, at 516 South Main Street, Los Angeles, California, have in his possession an indecent writing, book, pamphlet, picture, photograph and drawing, to wit, "Sweeter Than Life," in a place of business where magazines, books, pamphlets, pictures, photographs and drawings were sold and kept for sale.

Appellant was sentenced to thirty days in the County jail. The Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, affirmed the conviction. Appellant is presently at large on his own recognizance.

II

The Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Amended Notice of Intention to Appeal
2. Complaint
3. Reporter's Transcript
4. Demurrer
5. Amended Complaint
6. Demurrer to Amended Complaint
7. Defendant's Statement on Appeal
8. Minutes

9. Opinion

10. Judgment

11. Petition for Rehearing

[fol. 562] 12. Order Denying Petition for Rehearing

13. The book, "Sweeter Than Life" (Exhibit A-1)

14. This Notice of Appeal to the Supreme Court of the United States

III

The following questions are presented by this appeal:

1. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, by imposing absolute strict criminal liability for the mere possession of an "obscene" book in a place of business where books are sold or kept for sale, without requirement of proof of the defendant's knowledge of the contents or character of the book, and without regard to proof of the absence of such knowledge, upon its face and as construed and applied, and the prosecution thereunder in the instant case, violates procedural and substantive due process of law and denies the equal protection of the Constitution and or abridges freedom of speech, press and thought in contravention of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution, and the "freedom of speech and press" clauses of the First Amendment to the Constitution of the United States.

2. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, in view of the adoption by the courts below of the unconstitutionally restrictive *Hicklin* (L.R. 3 Q.B. 360) and *Besig* (208 F. 2d 142 (C.A. 9, 1953)) tests for determination of the "obscenity" of the book named in the complaint, which tests are materially different from the constitutional tests adopted in *Alberts* v. *California*, 354 U.S. 476 and *Butler* v. *Michigan*, 352 U.S. 380, upon its face, and as construed and applied, and the prosecution thereunder in the instant case, violates procedural and substan-

tive due process of law and denies the equal protection of [fol. 563] the Constitution and or abridges freedom of speech, press and thought in contravention of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution, and the "freedom of speech and press" clauses of the First Amendment to the Constitution of the United States.

3. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000 as amended, in view of the rulings of the courts below that no evidence was admissible on behalf of the appellant in the instant prosecution to show the artistic, literary, scientific and educational merits of the book named in the complaint; to show what the predominant appeal of the book would be to the average person and the effect on his behavior; to show the degree of public acceptance of the material contained in the book; and to show the absence of appeal to prurient interest, upon its face and as construed and applied, and the prosecution thereunder in the instant case, violates procedural and substantive due process of law and denies the equal protection of the Constitution and/or abridges freedom of speech, press and thought in contravention of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution, and the "freedom of speech and press" clauses of the First Amendment to the Constitution of the United States.

4. Whether the ordinance in the instant case, Section 41.01.1 of the Los Angeles Municipal Code, Ordinance No. 77,000, as amended, in view of the rulings of the courts below that the book named in the complaint herein, "Sweeter Than Life," is "obscene" upon its face and as construed and applied, and the prosecution thereunder in the instant case, violates procedural and substantive due process of law and denied the equal protection of the Constitution and/or abridges freedom of speech, press and thought in contravention of the "due process" and "equal protection" clauses [fol. 564] of the Fourteenth Amendment to the United States Constitution, and the "freedom of speech and press"

clauses of the First Amendment to the Constitution of the United States.

Brock, Fleishman & Rykoff, By Stanley Fleishman, Attorneys for Defendant and Appellant Eleazar Smith.

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[fol. 567]

SUPREME COURT OF THE UNITED STATES

No. 519—October Term, 1958

ORDER NOTING PROBABLE JURISDICTION—January 19, 1959

Appeal from the Appellate Department of the Superior Court of California, County of Los Angeles.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

[fol. 568]

IN THE SUPREME COURT OF THE UNITED STATES

No. 519—October Term, 1958

ELEAZAR SMITH, Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Appellee.

STIPULATION AS TO UNPRINTED PORTIONS OF THE CERTIFIED RECORD—Filed February 7, 1959

The appellant having filed a Designation of Portions of Record to be Printed herein, it is stipulated by the parties to the above entitled cause that reference may be made to any unprinted portions of the certified record in the briefs and oral arguments of the parties herein.

/s/ Stanley Fleishman, Counsel for Appellant.

/s/ Philip E. Grey, Counsel for Appellee.